

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
CENGAGE LEARNING, INC., :
et al., :
: 16-CV-07123 (WHP) (GSG)
Plaintiffs, :
: October 13, 2017
v. :
: 500 Pearl Street
BOOK DOG BOOKS, LLC, et al., : New York, New York
:
Defendants. :
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TRANSCRIPT OF CIVIL CAUSE HEARING FOR DISCOVERY ISSUES
BEFORE THE HONORABLE GABRIEL W. GORENSTEIN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE CLERK: This is conference in the matter of
2 Cengage Learning, Inc. v. Book Dog Books, Docket 16-CV-7123.

3 Counsels, state your name for the record. First in
4 the courtroom and then on the phone, please.

5 MR. BHANDARI: Good morning. My name is Rishi
6 Bhandari from the law firm of Mandel Bhandari LLP, and I
7 represent the defendants in this case.

8 MS. VICKERS: A. Leah Vickers also from the law firm
9 of Mandel Bhandari also representing the defendants in this
10 case.

11 THE CLERK: Counsel on the phone.

12 MR. OPPENHEIM: Yes, this is Matt Oppenheim and Jeff
13 Gould on behalf of the plaintiffs on the telephone.

14 THE COURT: Mr. Oppenheim, can you just give your
15 appearance again? I want to see if the volume button worked
16 here.

17 MR. OPPENHEIM: Okay. It's Matt Oppenheim and Jeff
18 Gould on behalf of the plaintiff publishers.

19 THE COURT: If you could just be as close to the
20 microphone as possible because you're not that strong.

21 MR. OPPENHEIM: Yes, sir.

22 THE COURT: Why don't you folks in the courtroom
23 have a seat so that they can be as close to the mic. Whoever
24 is speaking should -- by the base, not the neck. Bring the
25 mic as close as possible.

1 So we're here -- the letters that I have in front of
2 me are Dockets 125, 128, 131, 132, 133 and 135. So why don't
3 we start with the issues raised by defendants in 125.

4 MR. BHANDARI: Thank you, Your Honor. Would you
5 like me to give an overview of --

6 THE COURT: Well, just give -- I mean maybe I should
7 take us through issue by issue. Here's the thing. I've read
8 the letters. So here's the thing on the third party
9 depositions. If we didn't have a trial scheduled and if we
10 didn't have witness lists that were due, already due, and
11 exhibits already -- due today, deposition designations and a
12 pretrial order due October 25th followed by motions in limine
13 there -- I would be a little more open to this. My problem
14 with this is that you knew about these individuals -- these
15 companies I think it was March and you didn't seek to depose
16 them until just a couple of weeks before the deadline. It's
17 to be assumed that a third party is not going to drop
18 everything in order to meet a discovery deadline.

19 MR. BHANDARI: Your Honor --

20 THE COURT: Go ahead.

21 MR. BHANDARI: So that's not exactly factually
22 correct. We originally subpoenaed MBS, Follett and Chegg in
23 August, I think towards the end of August. So it might be
24 August 29th was when we subpoenaed them. MBS and Follett
25 accepted -- said that they would accept service through

1 counsel. Originally Chegg actually said that they would
2 accept service through counsel as well but all of them
3 basically took the position that the location of where the
4 deposition was taking place was not something they would
5 consent to.

6 While we thought we had the ability to depose them
7 here in New York because they regularly do business -- those
8 companies all regularly do business in New York and Rule 45
9 says that you can be deposed anywhere within 100 miles of
10 where you reside or where you regularly do business. We felt
11 that we could have stood on the subpoena but we didn't want to
12 fight over a silly issue like that. So we then at their
13 behest simply issued new subpoenas on September 20th for time
14 periods within the discovery period.

15 The back and forth between us and the third parties
16 started in August and I think for whatever reason they have
17 chosen to try and go slowly as possible.

18 THE COURT: When was the discovery deadline in
19 August? Because actually I moved it since then.

20 MR. BHANDARI: What's that?

21 THE COURT: When was the discovery deadline at the
22 time you started this, do you know?

23 MR. BHANDARI: Yes. The discovery deadline was
24 October.

25 THE COURT: It was October.

1 MR. BHANDARI: Yes, it was October 4th.

2 THE COURT: Okay. It was October as of August 14th.

3 So you did this --

4 MR. BHANDARI: Yes.

5 THE COURT: -- after that.

6 MR. BHANDARI: Right. Like I said, I think it was
7 August 29th is my recollection of when we served these
8 subpoenas. It might have been -- it was sometime during the
9 week of August 20th shortly after the discovery deadline was
10 moved to October 4th. So it's not that we sat back. It's not
11 that we didn't want to give ourselves time to negotiate time
12 and a place with opposing counsel. Their position was such
13 that they refused to talk about the scope of the depositions
14 unless we agreed to change the location. We agreed to change
15 the location and then in the Follett's situation we have
16 narrowed the scope. That deposition is going to take place on
17 October 24th and the other side, even plaintiffs don't --

18 THE COURT: I'm not worried about that one. That's
19 fine.

20 MR. BHANDARI: So it's the November 10th date that
21 is the earliest possible date that MBS says that they're
22 available. We started trying to negotiate with them in August
23 and that's just the earliest date that they could give to us.
24 Because there were third parties we didn't think that it made
25 sense to compel the deposition to happen in New York when that

1 was one thing we thought could be easily dealt with.

2 So while we'd be happy to take this deposition
3 earlier if the court were to order MBS to have to be deposed
4 earlier I suppose they would comply with whatever the court
5 orders there were whether or not causes them more expense as
6 they said that's the primary reason why they didn't want to go
7 during the weeks leading up to October 16th but we -- while we
8 prefer to have this done earlier it will not affect the
9 witness list. We already provided the witness list. We know
10 that there's either going to be follow up live witnesses or
11 follow up deposition witnesses that might be necessary. It
12 will not affect the exhibits. The exhibits are all things --

13 THE COURT: Well, that's good to hear. It won't
14 affect any exhibits.

15 MR. BHANDARI: It won't affect any exhibits.

16 THE COURT: Okay.

17 MR. BHANDARI: I suppose there is a document
18 subpoena that's returnable earlier.

19 THE COURT: Well, that's -- exactly.

20 MR. BHANDARI: The document subpoena is returnable
21 earlier. So I should -- the deposition will not affect any
22 exhibits. There will not be any --

23 THE COURT: Well, the exhibit list is due today;
24 right?

25 MR. BHANDARI: The exhibit list is due today, yes.

1 THE COURT: So it's not going to affect -- nothing I
2 do today is going to affect any exhibit list.

3 MR. BHANDARI: Only to the extent that there's some
4 additional documents that you ordered to be produced from
5 today's meet and confer or from today's hearing.

6 THE COURT: No, no, I meant on the basis of your
7 subpoenas to these third parties.

8 MR. BHANDARI: Again, we would simply make a request
9 to supplement the exhibit list if something was to be produced
10 after the exhibit lists are exchanged.

11 THE COURT: Okay. So obviously so it is an issue.

12 MR. BHANDARI: I suppose -- for Amazon it's not an
13 issue. We're not requesting any documents from Amazon.

14 MR. OPPENHEIM: Your Honor --

15 THE COURT: Hold on. So you proposed the date --
16 the earliest date for who was it?

17 MR. BHANDARI: For MBS is November 10th.

18 THE COURT: November 10th. So you're asking for a
19 deposition from MBS on November 10 and from Amazon on an
20 unknown date.

21 MR. BHANDARI: Yes. We would ask for the court to
22 set a deadline for that. We'll notice the deposition on
23 November 2nd but meet and confer with them and try and find a
24 mutually agreeable date before whatever deadline the court
25 imposes.

1 THE COURT: Mr. Oppenheim.

2 MR. OPPENHEIM: So the facts as they've been set out
3 not quite accurate, Your Honor. So there were initial
4 subpoenas for which notice was sent to us in August. I don't
5 believe the subpoenas were actually served on the third
6 parties in August. We had a hearing on September 7th, Your
7 Honor. All of the third parties indicated to the defendants
8 that they had substantial objections to the scope and the
9 locations of the subpoenas.

10 Defendants didn't do anything for several weeks and
11 sat on it for several weeks and then unilaterally noticed
12 without coordinating dates with anybody for the last couple of
13 days of discovery, October 2nd, 3rd and 4th, even though we
14 were already double tracked on other depositions. So they
15 knew there was no chance that the depositions were going to go
16 forward during the discovery period.

17 They also included a long list of topics that all of
18 the third parties had already indicated to the defendants were
19 objectionable and we had already told the defendants exceeded
20 the scope, Your Honor, of what -- of many of the rulings that
21 you've issued in this case.

22 So with respect to follow -- I won't go through the
23 details. I don't believe -- we'll go forward with the
24 deposition on the 24th because we agreed not to object on
25 timeliness basis but frankly we did that because defendants

1 told us that they were going to negotiate a stipulation that
2 would hopefully obviate the need for the deposition. They
3 then told us they had no objection to the stipulation we gave
4 them but won't agree to it. So not quite good faith but fine,
5 we agreed. We'll go forward with it.

6 The other two -- excuse me, not the other two. With
7 respect to MBS, their substantial disputes with MBS on the
8 scope of that deposition. They've not even had a discussion
9 about it yet. And we will -- depending on what happens in
10 that discussion we may have objections. So they have not
11 pursued this timely, Your Honor. They've waited to the last
12 minute. They knew about it in March and they -- both with the
13 MBS deposition and the Amazon deposition which has other facts
14 associated with it because there's been no contact with
15 Amazon.

16 They want to use these depositions to introduce new
17 issues into the case. New issues after discovery is closed.
18 So, for example, with respect to Amazon, they've noticed up a
19 topic about Amazon commingling inventory. This is the very
20 first instance where that issue has come up with respect to
21 Amazon shipping seller's inventory. So they're going to
22 introduce a brand new factual issue and presumably use it as a
23 defense after discovery is closed and after we've taken the
24 depositions of all their witnesses? I don't think that's
25 proper. We'll go forward with Follett. MBS and Amazon should

1 not happen.

2 THE COURT: Why did you wait until August when you
3 knew about all this in March?

4 MR. BHANDARI: Your Honor, I think that there have
5 been many, many aspects of this case that have been dealt with
6 at various different times. I think after looking at
7 documents and starting to get an idea of exactly what the
8 factual background is for what these allegations are it became
9 clear to us that there are some other issues here. Let me
10 give you some examples.

11 For example, it became very clear after taking the
12 deposition of Jessica Stitt which just happened in -- a couple
13 of weeks ago that MBS supposedly has provided source
14 information to the plaintiffs claiming that the plaintiffs are
15 the source of various books. Now, the plaintiffs don't have
16 any firsthand knowledge indicating they -- defendants are the
17 source of these books. The defendants don't believe that
18 there's a source of counterfeit books, of all the counterfeit
19 books that the plaintiffs are claiming that we are. MBS
20 clearly has information that's relevant to this.

21 The Amazon issue became something that became clear
22 after the first -- the depositions started taking place in
23 early September. It became clear that Amazon was actually
24 shipping counterfeit books to the plaintiffs. They were in
25 return. So Amazon supposedly bought new books from the

1 plaintiffs. When Amazon bought new books from the plaintiffs
2 they would not sell all of them. So they're able to return
3 them to the plaintiffs. But when they were returning books to
4 the plaintiffs what were supposed to be the original copies of
5 the new books that they received they would actually send in
6 the last -- during the course of the summer they said the
7 testimony came out in early September saying that sometime in
8 July or August of this summer Amazon was sending counterfeit
9 books back to the publishers under the auspices of potentially
10 -- of claiming that these were the new books that they had
11 purchased.

12 So that's what gave rise to our concern that Amazon
13 is commingling books where a lot of the books at issue in this
14 case that have supposedly been sold by the defendants have
15 never been touched by the defendants. What happens is Amazon
16 has a program where books get shipped directly to Amazon.
17 They're stored in the Amazon warehouse and then when someone
18 like the plaintiffs conducts a test purchase Amazon will send
19 those books directly to the plaintiffs.

20 Now, if Amazon is commingling books as it seems like
21 they must be based on the testimony we learned about in early
22 September from the defendants, if Amazon is commingling books
23 then one, there's a novel question on whether or not we could
24 be considered the distributor of those books when we had no
25 knowledge whatsoever that they were counterfeit and two,

1 certainly that goes very strongly to whether or not there's an
2 innocent infringement defense. So we learned about these
3 things.

4 So Amazon we did not notice on August 29th. We did
5 notice them for the first time on September 20th and we only
6 have three depositions topics with them. We're not seeking
7 documents from them and it's because of the testimony that
8 came tonight in this case in early September from the
9 defendants -- from the plaintiffs, excuse me. So that's the
10 reason for the Amazon subpoena being issued on September 20th.

11 MR. OPPENHEIM: Your Honor, can I --

12 THE COURT: What was the MBS reason again?

13 MR. OPPENHEIM: I'm sorry.

14 MR. BHANDARI: The MBS reason was it became clear as
15 we were studying this case and going through documents and
16 seeing what we had and what we didn't have that there's no
17 clear chain of custody indicating why the plaintiffs are
18 claiming that books that they got from MBS's warehouses during
19 audits of MBS they're claiming that the defendants sold those
20 books. We couldn't find anything. We thought that that would
21 be -- in order to bring a good faith claim against us we
22 figured that they would have to have clear documentation of
23 that.

24 When we started to take a very close look at all the
25 documents they produced it's evident that there's nothing

1 indicating that MBS actually has proof that the books in their
2 inventory were books that came from the defendants in this
3 case. So once that became clear we were like we have to
4 actually depose MBS. We have to depose Follett. We have to
5 depose Chegg to see how their inventories are stored.

6 For example, with Chegg, we just found out at the
7 deposition on October 4th that for certain books, rental books
8 our client will send a book directly to a Chegg customer. The
9 Chegg customer will use the book for an entire semester if
10 they want but that when they send the book back to Chegg,
11 Chegg then puts a sticker on it claiming that it was something
12 that was provided by our client.

13 Now, it's very possible as the Chegg witness
14 testified that the book that the student sends back -- let's
15 say that they lost a book.

16 THE COURT: Sorry. Why are we talking about Chegg?

17 MR. BHANDARI: Oh, to give you an example of how
18 we're finding out that the custody issues are not what the
19 plaintiffs have represented them to be in this case. MBS and
20 Follett -- the plaintiffs are claiming that MBS and Follett
21 have also identified books that were sourced by the
22 defendants. That's the heart of their claim.

23 There's almost no books that the defendant -- that
24 the plaintiffs have received directly from the defendants.
25 Every book that they claim in this case that is counterfeit

1 and that was distributed by the defendants --

2 THE COURT: So they said long ago that MBS has
3 counterfeit books that allegedly came from you; right?

4 MR. BHANDARI: Right. So we went through the
5 documents.

6 THE COURT: So why wouldn't you have at that time
7 subpoenaed MBS to figure out how it is that they have books
8 that came from you and what the process was?

9 MR. BHANDARI: We did in late August and that seemed
10 to be sufficient time.

11 THE COURT: No, no, not in August. Off the bat
12 here.

13 MR. BHANDARI: Your Honor, there was a -- there's
14 been a lot of discovery in the past two months. We've done
15 over 20 depositions all around the country. There were a lot
16 of things that had to be done and in August that's when we
17 realized that there should be depositions of MBS as well
18 because the documentary evidence was not -- did not clearly
19 tie any books from the defendants to sales or distributions
20 that were identified by the plaintiffs.

21 So we came to that conclusion. I can't tell you why
22 we didn't do it faster but we came to that conclusion in
23 August. We should subpoena shortly thereafter and they're
24 important pieces of information. I think that there's no real
25 reason why MBS shouldn't be deposed in this case. It's highly

1 relevant.

2 THE COURT: It's not that the issue. The issue is
3 this all happens weeks before the discovery deadline and that
4 -- I don't know if you -- I don't think you responded. Mr.
5 Oppenheim said there was a period in September where you did
6 nothing on all this.

7 MR. BHANDARI: That's not true. I was meeting and
8 conferring with opposing counsel during that period as well.
9 I mean it's just not true. I mean I don't know how Mr.
10 Oppenheim would even know that. Of course he wasn't on the
11 line for phone calls that I had with the opposing counsel but
12 that's how we got the Chegg deposition nailed down on October
13 4th even though it was issued on September 20th, the revised
14 subpoena because for several weeks I had in fact been
15 negotiating with opposing counsel. That's why the Follett
16 deposition is more or less lined up on October 24th.

17 MBS was far less -- I had less interaction because
18 their counsel took the position that they wouldn't give us any
19 dates, they didn't want to talk about the scope until there
20 was a date but I tried and so then we ultimately just issued
21 the subpoena and said now you can move for a protective order
22 and then instead of having to move for a protective order --

23 THE COURT: But there are other values at stake here
24 which is there is built into the schedule -- the problem is
25 there's the trial date. We have built into the schedule

1 motion in limine for example which are due in two weeks and I
2 can't imagine that Mr. Oppenheim will give up his right to
3 file a motion in limine as to any of the issues or testimony
4 or documents that might come up here and there's also the
5 disruption by the fact that the plan was to actually be
6 preparing these motions, preparing for trial on a fairly
7 expedited basis.

8 So that's the other value here and the problem is
9 that sometimes to achieve a value like that you are going to
10 have to forego the ability to get certain testimony especially
11 third party testimony when we don't have the same kind of
12 control over them and we have to be more solicitous and you
13 can't necessarily expect that they will be available within
14 the discovery deadline. That's the problem here.

15 So arguing relevance is not the point. That's the
16 problem.

17 MR. BHANDARI: Right. I mean, Your Honor, I would
18 say that it affects us just as strongly as it affects the
19 plaintiffs in this case. We would far prefer to get this done
20 at the time that we originally noticed the depositions because
21 there were third parties and because we tried to work with
22 them to find mutually agreeable dates.

23 THE COURT: Who do you care more about, MBS or
24 Amazon?

25 MR. BHANDARI: We care about them both a great deal.

1 If you're asking us to select then I would need a few minutes
2 to confer with my client if you said that we can only have one
3 but we care about them both a great deal.

4 I'll say one thing, Your Honor, which I think has
5 not been stated. MBS has entered into a settlement agreement
6 with the plaintiffs in this case. We believe that MBS is
7 having -- is cooperating with the plaintiffs and to the extent
8 that MBS was told not to go forward with depositions on
9 certain dates by the plaintiffs we don't know that that
10 happened but there's certainly cooperation between the two.
11 There's a settlement agreement between the two.

12 So, again, you can ask Mr. Oppenheim whether or not
13 he's had communications with MBS and told them that he didn't
14 want them to go forward with the scope of a deposition but we
15 think that there's reasons, tactical reasons.

16 THE COURT: This is speculation. The problem is you
17 bring this dispute to me on the last day of discovery and that
18 now creates this situation whereas if you had come in mid
19 September and said you know what, we're in big trouble here,
20 we're not getting assurances -- early September more likely.
21 We're not getting assurances this will happen by October 4th
22 there might have been things I could have done back then.
23 That's the problem here.

24 MR. OPPENHEIM: Your Honor, may I speak to some of
25 the factual misrepresentations that have been made that I

1 really think will help?

2 THE COURT: All right. Go ahead.

3 MR. OPPENHEIM: So the notion that the defendants
4 were not aware of these -- of the issues with MBS is just not
5 true. So when we served our Rule 26 disclosures we provided
6 images of the books at issue. For the MBS books, three out of
7 the four books have Textbooksrus stickers on them. Big round
8 promotional stickers that say Textbooksrus. The notion that
9 there's some question as to whether or not Textbooksrus
10 distributed these is belied by that which they received in
11 March.

12 But more importantly, these books were -- we told
13 the defendants in our very first discovery responses back in
14 March -- I believe March. Maybe it was April. That all of
15 the counterfeit books were available for their inspection and
16 within three out of the four MBS books -- there are only four
17 MBS books. Three out of the four MBS books there is a sheet
18 that MBS put within each of the books that indicates that the
19 books came from the defendants. Those sheets were
20 independently produced very early in discovery to the
21 defendants. So they had those sheets but had they chosen to
22 inspect the books, which they never did, they would have seen
23 those sheets and would have understood.

24 There's no question these four books came from MDS.
25 There's no testimony that's going to undermine it and so

1 everything that Mr. Bhandari said about questions on -- about
2 the -- where -- that the MBS books came from the defendants is
3 just simply not true.

4 Now, the suggestion that we told MBS not to go
5 forward with the deposition is -- that should not --
6 statements like that should not be made in open court because
7 there's no basis for them. We would not have done that and we
8 didn't do that. The notion that we would is -- well, it just
9 shouldn't be said in open court. It shouldn't be said anyway.
10 So MBS -- there's no basis for this.

11 Amazon, let me turn to Amazon. Mr. Bhandari's
12 description of Amazon -- first of all, he revealed something
13 that was highly confidential from the deposition and I'm not
14 troubled that it's been spoken in open court but now that it's
15 out there I'm going to speak to it because I have to respond.

16 The questions he asked about Amazon's return of
17 counterfeit books has nothing to do with the books at issue in
18 this case. When Amazon shipped to the plaintiffs books from
19 the defendants they have stickers on the back of them that
20 refer to Apex Media, which is one of the defendant's
21 storefronts, or Textbookrush, one of the other storefronts
22 that the defendants operate. There's no question that when
23 Amazon shipped boxed counterfeit books on behalf of the
24 defendants they were on behalf of the defendants because they
25 got those stickers on them. What Mr. Bhandari is referring to

1 has nothing to do with defendant's books. It is a separate
2 dispute that the plaintiffs have with Amazon over Amazon
3 buying books from the plaintiffs and then returning some books
4 that happened to have some counterfeits in them because Amazon
5 is apparently, we assume, sourcing some of their inventory
6 that they sell on their own behalf, not on behalf of others,
7 on their own behalf from some third parties who may have
8 counterfeit books.

9 That is an independent dispute that is frankly was
10 highly confidential and is certainly not a part of this case
11 and frankly should not be explored by the defendants while the
12 plaintiffs are still dealing with that issue with Amazon. So
13 both of these are beyond Follett and Ditor [Ph.]. They're not
14 timely. The defendants didn't pursue them. They should not
15 go forward.

16 THE COURT: Are you calling MBS or Amazon as
17 witnesses, are they on the witness list?

18 MR. OPPENHEIM: Yes, I do want to speak to the
19 witness list issue.

20 THE COURT: Can you answer my question first?

21 MR. OPPENHEIM: Amazon is not our witness list. MBS
22 is. We may call them. But remember, Your Honor, the
23 defendants already deposed MBS and BDB-1. So it's not as
24 though they haven't gotten testimony in BDB-1, general
25 testimony from them in BDB-1.

1 With respect to the four books at issue in this
2 case, they sat on their rights and if you look at the stickers
3 on the books and you look at the documents that were provided,
4 there's no question that these came from the defendants. So
5 we will be -- the court wants us to try to prepare thoughtful
6 motions in limine to narrow the scope of the case. The court
7 wants us to prepare a trial that is directed and well
8 organized. Having us run around like crazy at the last minute
9 undermines all of that and the defendants have created this
10 mayhem both with this discovery request, what they've done on
11 financial and we really need to try to put a stop to it.

12 On the issue of what Mr. Bhandari said on the
13 witness list where he said this is not going to affect their
14 witness list at all, that's because, Your Honor, their witness
15 list included every possible person involved in the case
16 including witnesses who had to do with the claims that --
17 fraud claims in the first case that have been dismissed,
18 right, and they've even included witnesses that Your Honor
19 precluded such as Mr. Mooney where you ordered -- they said
20 they would never going to call him and Your Honor in his order
21 said they're not allowed to call them based on what they
22 represented and they even included him.

23 So their witness list is -- they didn't do anything
24 other than just say here are the thousand people we could
25 possibly -- and thousands is an exaggeration, Your Honor, but

1 every possible person we could potentially call. So their
2 provision of a witness list was not at all useful. So that's
3 why they're saying it's not going to affect their witness
4 list.

5 MR. BHANDARI: Your Honor, may I respond to a bunch
6 of things?

7 THE COURT: Go ahead.

8 MR. BHANDARI: First of all, we did inspect the
9 books during the expert depositions. We looked at the
10 physical copies of the books and those slips as the testimony
11 indicated from their expert witnesses, nobody has any idea who
12 put those slips in there. They could have been done by
13 anybody.

14 Also, on September 26th Jessica Stitt testified --
15 from Cengage. She was a Cengage witness who testified --

16 THE COURT: And you say inspected it during the
17 expert depositions? Is that what you said?

18 MR. BHANDARI: Yes. In September. We --

19 THE COURT: But that's not the issue. The point is
20 if you cared about pursuing what MBS knew about the four books
21 at issue here you knew in March that MBS was the source. Not
22 the source. Was one of the I guess purchasers from you of the
23 books.

24 MR. BHANDARI: Your Honor, I will also say that on
25 September 26th we heard for the very first time from Jessica

1 Stitt at Cengage that there was a spreadsheet provided by MBS
2 that provides document source information. Her testimony was
3 -- I said -- the question was do you know whether or not any
4 of the books that you reviewed were allegedly obtained by MBS
5 from the defendants in this case.

6 "A I would need to see the document that supplied the source
7 information. So once the samples are sent to me and I
8 determine that they are in fact counterfeit then I receive
9 source information."

10 We have not received that source information even to
11 this point. It's one of the requests we have in our letter
12 that we wrote to you on October 4th. We heard about this on
13 September 26th. It amplifies the importance of this
14 particular deposition of MBS to figure out what source
15 information are they providing. Where is this information
16 coming from. How are they compiling it. When did they decide
17 to put slips into books. Who's keeping control of the books
18 if they get a shipment that has nine copies of the same title,
19 how do they decide which slip goes into which box or which
20 book.

21 THE COURT: Was this a subject of your deposition of
22 MBS in Book Dog Book 1?

23 MR. BHANDARI: I do not believe that it was the
24 subject of our deposition --

25 THE COURT: But surely you asked them how they knew

1 things; right?

2 MR. BHANDARI: I was not the counsel -- we were not
3 the counsel on the case so I don't know the answer off the top
4 of my head. But these books in particular is the four titles
5 at issue. Figuring out the source information for these is
6 important and it's something that -- if they will agree not to
7 call MBS as a witness then I suppose we can agree that we
8 don't have to take that deposition but if they're planning to
9 call MBS as a witness we noticed the deposition in August. We
10 tried to meet and confer. MBS says they're available on
11 November 10th.

12 It's disruptive to both sides but unfortunately in
13 trial situations I've had situations where even the weekend
14 before the trial the court has ordered depositions to take
15 place for witnesses who became available who otherwise might
16 not have been on the witness list previously. It's
17 unfortunate. It's not what I want to happen by any stretch of
18 the imagination but in the course of trying to meet and
19 confer with third parties this was the only -- the only date
20 that the third party said that they were available and so
21 that's why we're asking the court for a special dispensation
22 to be able to take the MBS deposition on that date.

23 MR. OPPENHEIM: One very quick note, Your Honor.

24 MR. BHANDARI: Of course the plaintiffs can
25 participate by phone or by video if they don't want to deal

1 with the travel --

2 MR. OPPENHEIM: All of the slip sheets that were put
3 within the books --

4 THE COURT: Mr. Oppenheim, you can't be talking when
5 Mr. Bhandari is talking.

6 MR. OPPENHEIM: I'm sorry. I thought he had
7 finished. I apologize.

8 THE COURT: He has been talking for the last minute.
9 He was talking about disruption and talking about minimizing
10 the disruption through video or telephone. Anyway, go ahead.

11 MR. BHANDARI: I had one very last point.

12 THE COURT: Hold on. Don't go ahead.

13 MR. BHANDARI: In terms of the timing just to be
14 very clear about the timing, the document production in this
15 case was ongoing through September to be perfectly honest. We
16 were getting documents from the plaintiffs through September
17 but the substantial part of the document production was not
18 completed until August. Party depositions, and there have
19 been over 20 of them, took place starting in late August. I
20 think August 26th or 31st. I can't remember was the first
21 deposition, party deposition that took place. And it was
22 because both sides agreed that it didn't make sense to start
23 party depositions until after all documents had been fully
24 exchanged. It was the same thing with MBS, Follett and Chegg.
25 We didn't think that it made sense to take their depositions

1 prior to the document production being substantially complete.

2 So the late August subpoena really was the earliest
3 that we could realistically serve a subpoena and know that we
4 could take the deposition on the date that we served the
5 subpoena for. We could have been placeholder subpoenas and
6 then continually told the third party oh, we can't do it on
7 that date because we haven't received documents but that
8 wouldn't really have made any sense.

9 In this case the reason why there were over 20
10 depositions in September and October all around the country is
11 because document production from both sides really wasn't
12 complete until August, substantially complete until August and
13 still as far as we can tell isn't fully complete from the
14 plaintiffs.

15 THE COURT: Go ahead, Mr. Oppenheim.

16 MR. OPPENHEIM: So the spreadsheets which Ms. Stitt
17 was referring to was the plaintiffs aggregated all the
18 information in the slip sheets contained within the books and
19 put it into a spreadsheet. That spreadsheet was produced to
20 the defendants. They've had it. Again, they chose not to
21 inspect these books. We said to them in April or March or
22 April they're here, you're welcome to come see them. We'll
23 make them available for inspection.

24 We said many times in the back and forth in this
25 case they're available for inspection. They got very upset

1 that we weren't going to bring them to the expert depositions
2 even though the expert depositions were going to take place in
3 New York, the books were in Washington. They got very upset
4 on a Friday. I actually had one of my paralegals drive the
5 books up to the expert depositions so they'd be available for
6 the defendants to inspect during the expert deposition.
7 Several weeks ago they had the slip sheets. They sat on their
8 rights here. They had the ability to pursue this and all of
9 this is a problem of their own making.

10 MR. BHANDARI: I disagree with that, Your Honor.

11 THE COURT: I've had enough on this. I'm going to
12 give you a ruling at the end. I want to do the other issues.
13 Audits and reviews. I got to refresh my recollection on this.

14 Okay. So here's the problem here, Mr. Bhandari. In
15 May for good or ill Mr. Mandel agreed to limit this in my view
16 to the titles at issue in this case. In other words, to
17 documents involving inspections that related to the titles at
18 issue in this case. So that's our first limitation.

19 Then we got into the issue of burden. And I
20 accepted your arguments on relevance. I accepted that this
21 material was relevant so we don't need to go over that again.
22 But there was a statement regarding burden and I said well,
23 I'm going to need more information on that. Then the thought
24 was being put forward that there was going to be a way to
25 provide to you information that related to sort of large

1 inspections.

2 By the way, on burden, it wasn't just finding it.
3 It was also that it was going to interfere with negotiations
4 that were ongoing with other people. So then I said we'll
5 leave it as it is now, they're going to make this effort that
6 I described and then if you had to you would come back to me.

7 Now, when I said in May that you could come back to
8 me I did not expect and certainly my orders -- most obviously
9 my order on February 25th where I said you have to tell me
10 about any disputes immediately and no later than the 30 days
11 prior to the end of discovery I think it was pretty clear that
12 I was not going to have you come back to me on the last day of
13 discovery on this. So that's kind of the overarching problem.

14 So with that in mind, why don't you tell me what's
15 going on.

16 MR. BHANDARI: Sure. So, Your Honor, if you go to
17 Page 3 of our letter we have enumerated four bullet points of
18 documents that we think should have been produced earlier
19 through the course of reviewing their documents that were
20 being produced to us through the end of August and then doing
21 depositions we realized things that have not been produced to
22 us. On September 13th I wrote a letter to opposing counsel --

23 THE COURT: No. But did you follow up from my
24 ruling in May to track this issue and say well, what are you
25 going to give us, why not, and do we have to go back to the

1 judge. What --

2 MR. BHANDARI: Your Honor --

3 THE COURT: Don't interrupt me. All right. What
4 happened on that front specifically? Go ahead.

5 MR. BHANDARI: Your Honor, we were told all
6 responsive documents are going to be produced by the
7 plaintiffs and they made a rolling production with I think it
8 was 18 or 19 different productions through the middle of
9 August. We believed we were going to get all responsive
10 documents that the court ordered should be produced through
11 the middle of August. When we started taking -- when we
12 reviewed the documents they gave us and we started taking
13 depositions it became very evident they had not produced
14 documents that they said that they were going to produce that
15 the court ordered them to produce.

16 So on September 13th I wrote a letter to them saying
17 here are 20 categories or 24 categories of documents that you
18 guys should have produced to us that you haven't. Please
19 produce these to us immediately.

20 On September 16th opposing counsel wrote a letter
21 back to us. On September 18th I had a --

22 THE COURT: Yes. But you know I'm just talking
23 about the titles at issue in this case.

24 MR. BHANDARI: Yes. So the first -- there's two
25 requests that deal with only the titles at issue in this case

1 and then there's two requests that are slightly different than
2 that. So let's start with the first one.

3 In terms of -- so I was addressing the timing.
4 So --

5 THE COURT: I'm sorry. You're right. I just wanted
6 to make sure you knew that there's no way you're getting
7 anything beyond the titles at issue in this case because that
8 was a definitive ruling in May.

9 MR. BHANDARI: Okay. So the first bullet point is
10 related to the titles at issue in this case only and it
11 basically says please give us the results of all your audits
12 and inspections for any of the titles at issue in this case.
13 There's 24 titles at issue in this case. Please tell us --
14 show us all of the results for any audits you conducted. How
15 many books did you think were suspected of being counterfeit,
16 which ones were counterfeit, what were the sources of those
17 books, where did they come from.

18 So the first bullet point is squarely within what
19 the court ordered, what we expected to be produced and it has
20 not yet been produced.

21 THE COURT: But again you're missing my point which
22 is they raised issues at the time regarding burden, both sort
23 of literal burden and finding it to the extent there was just
24 a random inspection of one seller or another. But also this
25 burden regarding their ongoing negotiations [inaudible].

1 So what I said was I don't know the answer to this
2 question because I don't have enough information about this
3 burden. You need to discuss it further and figure out what
4 the arguments are on that point and if you think you have a
5 basis for coming back to me. So was there discussion -- at
6 that point I think it was obvious it wasn't enough to just say
7 okay, well they never gave it to us, so now it's the end of
8 discovery so now we want it. There was an obligation on your
9 part to explore the burden issue and present it to me and not
10 on the last day of discovery.

11 MR. BHANDARI: Your Honor, we did explore the burden
12 issue and that's why this request as you'll see says for any
13 person or business which plaintiffs have inspected, audited or
14 reviewed at least 500 books since January 1, 2013 to the
15 present. Documents sufficient to show the results for each
16 copy of all the titles at issue in this case including but not
17 limited to the person or business's source of the books.

18 So, Your Honor, we did have negotiations with them.
19 We did try and limit the idea that if there's a single book
20 seller who does one surrender that they have to track down
21 every single one of those for the titles at issue, we
22 understood that and we said fine. For people who you have
23 inspected 500 or more books since January 1, 2013 then please
24 give us the audit results or the inspection results.

25 They did not say that that was an impossible burden.

1 They -- I don't even know that they're going to say that
2 that's an impossible burden now but they didn't produce this
3 document and raised it with them at the -- when we first
4 realized that they didn't produce it and it became evident
5 after the depositions, the initial round of depositions we
6 took that --

7 THE COURT: But it became first evident in May.
8 That's when it was first evident. That's why you brought it
9 to my attention.

10 MR. BHANDARI: Your Honor, they represented to us
11 that they produced all medium and large audits of our books.
12 That's what they represented.

13 THE COURT: Maybe we're arguing over nothing.

14 MR. BHANDARI: They told us that.

15 THE COURT: Are we arguing over nothing, Mr.
16 Oppenheim? Have you produced inspections of the titles at
17 issue for the larger 500 or more book inspections?

18 MR. OPPENHEIM: Your Honor, there are -- we did
19 produce results for four different audits that were done. Two
20 of them I would categorize as large. Two of them I would
21 categorize actually as medium size. We produced those. The
22 defendants raised questions with us in August about it. We
23 had an email exchange with opposing counsel on August 16th
24 where we told them exactly what we had done and what we were
25 producing and we never heard from them after that until we're

1 sitting in a deposition and Mr. Bhandari during a deposition
2 as is apparently his custom is he calls for the production of
3 documents during the deposition even though it's not a proper
4 way as far as we believe to request production. He calls for
5 production of documents.

6 Then afterwards he sends us this letter on September
7 13th listing everything he asked for in the depositions but
8 doesn't as early -- and wants to have a meet and confer on it
9 but he doesn't relate it back to any request for production.

10 So we had a very lengthy meet and confer with Mr.
11 Bhandari over that trying to understand what is it that you're
12 asking for, how does it relate to the request for production
13 and tell him what we produced. We went through all of that.
14 We dealt with all of those issues. It took a very long time.

15 He then sends this letter to the court with these
16 four bullet points which by the way we had never seen before.
17 He never discussed with us. Those four bullet points, Your
18 Honor, in his letter of those documents don't -- he doesn't
19 tell you which document request they come from and when we
20 tried to meet and confer with him yesterday he was
21 exacerbad, frustrated and didn't want to tell us where they
22 came from and in fact after three of them he refused to tell
23 me any more.

24 But so having said that, okay, a meet and confer has
25 to be -- and the letter has to be regarding a motion to compel

1 a specific request for production. The request for production
2 at issue in the first three bullet points is apparently
3 request for production No. 8. With respect to No. 8, we have
4 produced documents and we have produced responsive documents.
5 So I just don't know --

6 THE COURT: I don't think you've answered my
7 questions --

8 MR. OPPENHEIM: -- what it is we're arguing.

9 THE COURT: Mr. Oppenheim, I don't think you've
10 answered my question --

11 MR. OPPENHEIM: And --

12 THE COURT: Mr. Oppenheim, can you hear me?

13 MR. OPPENHEIM: And -- yes, sorry, Your Honor. Go
14 ahead.

15 THE COURT: I don't think you've answered my
16 question yet. Should I try it again?

17 MR. OPPENHEIM: Yes, please. I apologize then.

18 THE COURT: What I'm trying to understand is are
19 there documents relating to the titles at issue in this case
20 for inspections that we can categorize as large, say 500 or
21 more books, that have not been produced to the defendants.

22 MR. OPPENHEIM: So, Your Honor, to the extent that
23 in the last month we've done an additional inspection which I
24 know we have large inspection, I don't know because those
25 results are just being compiled. But as of the August date

1 when we had a meet and confer with Mr. Bhandari's counsel, A.
2 Leah Vickers, we had produced all of the medium and large ones
3 to date when we had that meet and confer.

4 THE COURT: So it sounds like, Mr. Bhandari, we're
5 having an argument over nothing. I mean now that I've limited
6 this to the titles in the case.

7 MR. BHANDARI: It sounds like there's a supplemental
8 -- like under Rule 26 there's supplemental exposures.

9 THE COURT: I agree he has an obligation to
10 seasonably amend as soon as it's in a format that it's
11 possible. So if something happens since August that was a
12 large inspection and it involved the titles at issue in this
13 case I guess there might be an obligation although it's
14 certainly of less relevance since the sales happened a while
15 ago. But I think this is an argument over nothing now.

16 MR. BHANDARI: So if -- just so we've got a clear
17 record on this then, Your Honor, because I think that you may
18 be right. Am I correct from what I understand that
19 plaintiff's counsel has represented that they have already
20 produced all the results for any audits or inspections from
21 businesses whom the plaintiffs reviewed at least 500 books
22 from January 1, 2013 to the present except for such results
23 that are currently being compiled in a format that will be
24 produced to us in accordance with Rule 26 as a supplemental
25 disclosure?

1 If that's what their testimony is then you're right,
2 we are done with that. It's not what our understanding was
3 based on depositions. When I was taking depositions --

4 THE COURT: Stop, stop. Let's just make -- let's
5 see if that is -- that certainly what I understood Mr.
6 Oppenheim to say just now. Is that right, Mr. Oppenheim?

7 MR. OPPENHEIM: First off, Your Honor, I am not
8 testifying.

9 THE COURT: I agree. It's not testimony. It's a
10 statement.

11 MR. OPPENHEIM: Okay. Second of all, this 500
12 number, the first time I ever saw it was in the letter to Your
13 Honor. I have never done --

14 THE COURT: How do --

15 MR. OPPENHEIM: -- nor do I have an obligation to do
16 calculus as to what we did. Your Honor said large. We did
17 large and medium.

18 THE COURT: What does that mean?

19 MR. OPPENHEIM: So that's what we did.

20 THE COURT: What does large mean?

21 MR. OPPENHEIM: We did not go back to -- sorry, Your
22 Honor.

23 THE COURT: What does large and medium mean?

24 MR. OPPENHEIM: I didn't hear you speaking. I
25 apologize.

1 THE COURT: What does large and medium mean?

2 MR. OPPENHEIM: I haven't quantified them, Your
3 Honor. I know what the audits have been and based on just
4 kind of knowing kind of the scale of them and I don't have
5 them as I sit here, we did large and medium.

6 THE COURT: Are there inspections of 500 or more
7 that are not included in large and medium, or you don't know?

8 MR. OPPENHEIM: I have no idea because I've never
9 asked for numbers. Is the 500 related to the titles at issue
10 or is the 500 related to total books reviewed, is it 500
11 titles? I mean the 500 number I have no idea what it is and
12 it's not well defined nor did I ever do an analysis of it.

13 THE COURT: Well, I --

14 MR. OPPENHEIM: The court said large and medium. We
15 gave them four of them. They have four of them.

16 By the way, Your Honor, just also to be clear. In
17 those bullet points they exceeded the scope by date of what
18 they actually had originally asked for. They originally asked
19 for 2014 forward and then in their letter motion to compel
20 they want to 2013 to the present. So this is all -- they're
21 asking for things they never asked for before and I haven't
22 investigated and I don't -- I'm not testifying as to it. I'm
23 telling you what we did, Your Honor. We complied with your
24 order. We did produce. I frankly still don't understand the
25 relevance of it and think it's totally irrelevant but we've

1 done it.

2 THE COURT: Well, I overruled your relevance
3 objection. So I don't know why you're raising that.

4 I think I need to -- I think you need to have some
5 basis for explaining to me what was a large and medium and
6 what's not included. So if you can figure out a way to at
7 least describe that I think you should provide that to Mr.
8 Bhandari and if he wants to come back with a request on this I
9 may consider it but it's -- I really would not like to spin my
10 wheels if it's in fact the case that you have produced what I
11 said was relevant which was -- and not obviously burdensome
12 which was results of any "large, major" whatever inspections
13 that related to the titles at issue -- that included books at
14 -- that are at issue in this case.

15 So I think that information needs to be provided to
16 Mr. Bhandari. If he wants to come back then he can come back.
17 I'm not saying I'm going to do anything at this point but I
18 just don't want to waste my time if in fact you've done
19 everything that you could have done anyway.

20 MR. OPPENHEIM: Your Honor, this is not an exercise
21 where I'm aware of a whole bunch of audits that were done that
22 we're classifying as small and so we're thus not producing it.
23 That's not the situation. I cannot think of any -- any audit
24 of any kind of substantive nature that was done that we didn't
25 produce except for the one I just told you about very

1 recently. So they really got it.

2 Frankly, Your Honor, in August we had a meet and
3 confer on this exact issue. So the idea that on October 4th
4 they send their letter and I now have to go digging and find
5 out questions about numbers and five and scope it just seems
6 that this is not what I should be forced to do this late in
7 the game. It's bad enough I got to deal with the financial
8 document issue they created for me. I've got stuff to do to
9 prepare this case for trial.

10 If Your Honor orders us to do it we will absolutely
11 do whatever you order us to do, Your Honor, but we've complied
12 with your order.

13 THE COURT: I just want some -- I just want some --

14 MR. OPPENHEIM: They've got this information. I
15 don't know how they're going to use it but they've got it.

16 THE COURT: Mr. Oppenheim, if we ever do this on the
17 phone again can you just make sure you don't use a speaker
18 phone because it's impossible to talk to you when I want to
19 get your attention sometimes.

20 I didn't think what I was asking to do was highly
21 burdensome. I think there has to be some way you can explain
22 other than your own gut why the -- what you have produced was
23 reasonable in terms of the burden and that any other
24 inspections were of such a minor nature or so small that they
25 weren't included in your production, that the ones that you

1 chose were appropriate. So produce a letter of some kind the
2 best you can on that topic within the next week and then if
3 Mr. Bhandari thinks he has a basis to come back to me I will
4 think about it then but I just want something other than your
5 own gut to explain what was produced. Next issue.

6 MR. BHANDARI: So for bullet points 2 and 3 I
7 understand your ruling, Your Honor. We do have questions
8 related to inspections of any books that were sourced from the
9 defendants. It's not just the titles at issue in this case.

10 THE COURT: No, no. It's just the titles at issue
11 in this case.

12 MR. BHANDARI: That's what I'm saying. So for
13 bullet points 2 and 3 I understand you're saying we're not
14 getting them because they're too broad. So we would limit it
15 just to the titles at issue in this case.

16 THE COURT: Yes.

17 MR. BHANDARI: The books that were sourced from the
18 defendants that are the titles at issue in this case for any
19 person or business from which plaintiffs have inspected. So
20 for bullet points 2 and 3 we will limit them in exactly the
21 way that you've described which is for the titles at issue in
22 this case.

23 THE COURT: Well, you're not limiting anything. I
24 made a ruling in May.

25 MR. BHANDARI: Right.

1 THE COURT: And I'm not sure your bullet points add
2 anything to this. I made a ruling in May about a request. I
3 told them -- I overruled the relevance objection. I accepted
4 the burdensomeness objection. I understand there was
5 discussion about the issue and what was being produced in
6 August and I just want to follow through on that and made a
7 ruling. That's all. So I'm not -- your bullet points are not
8 the point for me.

9 MR. BHANDARI: Okay. For the fourth bullet point
10 that's related to a press release that we asked questions
11 about during the deposition where Exhibit E was a press
12 release issued by Cengage where they said in the second
13 paragraph of the press release in cooperation with EPEG [Ph.]
14 Cengage recently reviewed the inventory.

15 THE COURT: I'm totally lost now because I had
16 viewed this whole request as following up on the May 11th
17 ruling in the pages that you -- or the excerpt you provided to
18 me.

19 MR. BHANDARI: The first three bullet points.

20 THE COURT: So can you just give me some -- can you
21 give me some explanation of where this fourth bullet point is
22 coming from and how it fits into the world?

23 MR. BHANDARI: Yes. The fourth bullet point is
24 based on a document that was provided in discovery.

25 THE COURT: So is this the subject of a previous

1 document request or is it a new document request?

2 MR. BHANDARI: This would -- the document request is
3 a general document request which we said documents related to
4 the distribution of counterfeit -- I can find you the specific
5 document request that it refers to in a moment if you'll just
6 give me a second. Let me just tell you the background of this
7 request.

8 THE COURT: This just sounds like the plaintiff's
9 audit inspection of books and you want documents about that
10 and I already limited it to the titles in this case and the
11 major inspections. So what are we talking about now?

12 MR. BHANDARI: This is a particular statement that
13 they made. This statement in a press release they say that
14 there are certain online book sellers who have 75 percent to
15 100 percent of the titles in their inventory are counterfeit.
16 So all we have said to the other side is please just provide
17 is with whatever documentation you have supporting your public
18 statement that there are online book sellers who have 75
19 percent to 100 percent of the titles in their inventory as
20 being counterfeit.

21 THE COURT: So this is a new document request,
22 right?

23 MR. BHANDARI: It's not a new document request.
24 It's a -- it's a document request that would be related. It
25 would be the sort of thing that we would get based on

1 documents sufficient to show the identities of entities with
2 whom you have decided not to conduct business due to concerns
3 regarding counterfeit books. That would be our overarching
4 document request from March.

5 THE COURT: Is this the -- was this raised with me
6 at the May 11th conference?

7 MR. BHANDARI: No. This was something that only
8 came up during the course of a deposition when I showed this
9 document to the 30(b)(6) witness for Cengage and I said to the
10 30(b)(6) witness can you please tell us who -- what is your
11 basis for saying that there's online sellers that have 75
12 percent to 100 percent of the titles in their inventory are
13 counterfeit. The person says I don't know off the top of my
14 head, there's documents we have that obviously support this.
15 And I said okay, please provide us with these documents on
16 September --

17 THE COURT: Didn't I already make a ruling that
18 you're going to get information about other sellers only with
19 respect to the titles in this case? That's the ruling I made
20 in May.

21 MR. BHANDARI: I think with regard to general audit
22 and inspections, yes.

23 THE COURT: Okay --

24 MR. BHANDARI: This is not necessarily a general
25 audit and inspection. They might have gotten this from like a

1 third -- the police reports might have told them this. They
2 might have gotten it from an FBI raid. There might have been
3 customs officials who do this. We have no idea what the basis
4 is. If they oh, the basis is the audit --

5 THE COURT: But this is the same -- this was my same
6 problem last time which is if there are sellers out there who
7 have counterfeit inventory that's not the inventory in this
8 case that is just balancing proportionality and all the other
9 factors. That's not going to be part of the discovery in this
10 case.

11 MR. BHANDARI: We don't know that it's not the
12 inventory in this case. We don't know anything about who
13 these sellers are, what books they have, what books were in
14 their inventory. It could be titles at issue in this case.

15 THE COURT: But now we're back to where we were
16 which is if they actually examined it and something we can
17 call an auditor inspection and they found these titles and
18 it's major you're getting it.

19 MR. BHANDARI: But it might not be from an auditor
20 inspection. It could -- like I said, we just have no idea.
21 This is simple stuff. We're not asking for the audit results
22 for everything. We're not saying show us the backdrop of what
23 you did in order to gather the information but in the
24 deposition the 30(b)(6) witness for Cengage said there would
25 be documents that substantiate our position in the press

1 release that there are certain online book sellers that have
2 75 percent to 100 percent of the titles.

3 THE COURT: When did you get this press release?

4 MR. BHANDARI: Where or when?

5 THE COURT: When.

6 MR. BHANDARI: I don't know.

7 THE COURT: Mr. Oppenheim.

8 MR. OPPENHEIM: So this -- I presume this arises
9 because the defendants have sent a premotion letter to compel
10 production of a request for production that they believe we've
11 not produced documents on. So they don't identify what the
12 request for production is in their letter.

13 In the meet and confer yesterday Mr. Bhandari
14 refused to tell me which request for production this relates
15 to. Today for the first time I'm hearing that it relates to a
16 document request that has to do with entities that the
17 plaintiffs will not do business with. How you can connect the
18 statement in the bullet point to that document request I don't
19 know but I do know, Your Honor, that we had a hearing and I
20 haven't had a chance to pull up the transcript to this -- this
21 is the first time I'm hearing this. Where they moved to
22 compel this issue and Your Honor said no, it has nothing to do
23 with the defendants. So you don't -- the defendants don't get
24 to take discovery into who the plaintiffs choose to do
25 business with or don't choose to do business with.

1 Now, I can't connect that discussion to this press
2 release but that is apparently what Mr. Bhandari is trying to
3 do. So, anyway, again, we produced a press release because he
4 thought that the fact that it addressed counterfeits in some
5 ways we should produce it.

6 Now, at a deposition he calls for documents, again
7 not an appropriate way to request documents. Then he just
8 keeps going at it. There's no issue that's properly put
9 before the court at the moment I don't believe.

10 THE COURT: What is your document request?

11 MR. BHANDARI: So there's several document requests
12 that this would relate to but it is something that also did
13 come up in the course of a deposition.

14 THE COURT: Wait, Mr. -- to get practical here. Do
15 you know, Mr. Oppenheim, by any chance what documents exist
16 that fit within -- understanding that fourth bullet point is
17 not a document request but just for the sake of simplicity and
18 perhaps cutting through this, do you know what documents exist
19 that correspond to what's being asked in the fourth bullet
20 point?

21 MR. OPPENHEIM: I know what the press release
22 relates to. I'm not sure what the documents are. But it has
23 nothing -- the reference in the press release has to do with
24 online sellers selling counterfeits. How that has anything to
25 do with this case I don't know and I'm not really at liberty

1 to go into that those online sellers because that's a
2 different litigation.

3 THE COURT: We have to go back, Mr. Bhandari,
4 because you have to show me that there's a document request --

5 MR. BHANDARI: Sure.

6 THE COURT: Hold on. Pre-existing the one in your
7 letter, a timely document request --

8 MR. BHANDARI: Sure.

9 THE COURT: Hold on.

10 MR. BHANDARI: Okay.

11 THE COURT: That calls for production of material
12 that you number one, have reason to believe was not produced
13 and two, was not previously addressed by me with respect to
14 the request in which the request was limited.

15 So this letter does not do it because all this
16 letter did was talk to me about the May 11th hearing and I'm
17 not even sure what document request at this point but I feel
18 that this issue is just not teed up. I mean I don't know what
19 we can do it right now. If you want to take one more crack at
20 it

21 MR. BHANDARI: Sure.

22 THE COURT: Go ahead.

23 MR. BHANDARI: Okay. So first, Your Honor, if you
24 look at Exhibit D there's a letter dated September 13, 2017.

25 THE COURT: No. Well, that's a document request.

1 Okay.

2 MR. BHANDARI: Yes.

3 THE COURT: So there's a document request here.

4 MR. BHANDARI: Right.

5 THE COURT: Which document request am I looking at?

6 MR. BHANDARI: No. 17.

7 THE COURT: Okay. I'm not saying this is timely but
8 it's more than -- less than 30 days before the end of
9 discovery.

10 MR. BHANDARI: Right.

11 MR. OPPENHEIM: I'm sorry. Which request for
12 production is that?

13 MR. BHANDARI: I can tie it back to an earlier
14 document request that's more general but this is the specific
15 request that they have had since September 13th of 2017.

16 THE COURT: Okay. I think we need to go -- since
17 this is not a timely document request I think we should go
18 back to the original one.

19 MR. BHANDARI: So the original one would be would
20 Request No. 12 in the first set of document requests that were
21 issued I guess in June -- not the first. This is the second
22 set of document requests that were issued in June of 2017.

23 THE COURT: What's No. 12?

24 MR. BHANDARI: Request No. 12 says all documents
25 concerning the ability of one or more book distributors,

1 wholesalers and/or retainers to discern legitimate books from
2 counterfeit books.

3 THE COURT: Concerning their ability.

4 MR. BHANDARI: So here they have -- that's a general
5 request. We understand that that's a general request. It was
6 made more specific when we saw documents that specifically
7 raised a particular question.

8 I would also like to add that we have during the
9 meet and confer a statement from opposing counsel from
10 September 20th of 2017 in response to the Exhibit D letter
11 from September 13th saying we're looking into Item 17 and 18
12 of your letter and hope to have answers for you shortly. They
13 accepted that they were -- these things were responsive to
14 previous requests. I've gone through it.

15 THE COURT: Please, please, don't set Mr. Oppenheim
16 off. That doesn't tell me anything --

17 MR. BHANDARI: I have the email here.

18 THE COURT: -- about whether it's responsive. So if
19 -- going back to my question. What does -- Document Request
20 12, repeat it again for me.

21 MR. BHANDARI: All documents concerning the ability
22 of one or more book distributors, wholesalers and/or retailers
23 to determine -- to discern legitimate books from counterfeit
24 books. So they have a statement where they say 75 percent --

25 THE COURT: Hold on, hold on, hold on. Concerning

1 their ability. What does this have to do with proportion of
2 counterfeits found by Cengage? I'm totally lost.

3 MR. BHANDARI: They say that they've identified 75
4 percent to 100 percent of the books in certain online book
5 seller's inventories as being counterfeit.

6 THE COURT: So therefore that shows they have some
7 ability to identify it. Is that what you're getting at?

8 MR. BHANDARI: Yes.

9 THE COURT: Well, I'm not so sure that's true. It
10 shows that they claimed to have identified it. Who knows how
11 they did it.

12 MR. BHANDARI: Okay. Then let me find another
13 document request from our original document request.

14 THE COURT: Go ahead.

15 [Pause in proceedings.]

16 MR. OPPENHEIM: To the extent it helps, Your Honor,
17 we produced this press release on June 20th. They took the
18 deposition and asked a witness about it on September 8th.
19 Let's be done with this. There's no reason that this issue
20 should have been raised on October 4th.

21 MR. BHANDARI: Request No. 8 in our original
22 document request says with respect to each book that
23 plaintiffs viewed for the purpose of determining whether it is
24 counterfeit from January 1, 2014 to the present documents
25 sufficient to show the title, edition, ISBN, author, all

1 sources of sellers, inspection, location, inspection date,
2 inspection results --

3 THE COURT: The titles in this case.

4 MR. BHANDARI: That was not for the titles at issue
5 in this case. It's for titles that they determined were
6 counterfeit. Now, we narrowed it again specifically over the
7 course of time to just the things that support their statement
8 in a press release. We were told during a 30(b)(6) deposition
9 in early September that there's just -- documents that Cengage
10 has that lay out what evidence if any they have to support
11 public statements they're making about --

12 THE COURT: So why did you wait until October 4th on
13 this?

14 MR. BHANDARI: We -- we wrote our letter on
15 September 13th. We met and conferred through September 20th.
16 On September 20th I got an email from Julie Chen in Mr.
17 Oppenheim's firm saying Rishi, per our meet and confer I'm
18 providing the Bates number of the following -- in response to
19 Items 1 and 20 of your letter. We are -- and then skipping it
20 says we are still looking into Items 17 and 18 --

21 THE COURT: I take it back on the timing because I
22 can't do two things at once. It's my fault. You were in the
23 middle of a document request which I didn't even understand.
24 What is the document -- I couldn't fit it into the first --
25 are we going to have any more document requests you're going

1 to claim this fits into?

2 MR. BHANDARI: I think so. I think there are many
3 document requests that this fits into, Your Honor, and that
4 was never something that was raised by opposing counsel.

5 THE COURT: You know what, this is coming out of
6 nowhere. Have another meet and confer and write another
7 letter if you want. Right now I'm not ordering anything.

8 What's the next issue?

9 MR. BHANDARI: The next are communications that are
10 supposedly not being produced to us because of the common
11 interest privilege.

12 THE COURT: Hold on. Hold on.

13 [Pause in proceedings.]

14 THE COURT: This is easy. They say they don't have
15 any.

16 MR. BHANDARI: That's their position that they don't
17 have any such documents?

18 THE COURT: Yes. Did you read their letter?

19 MR. BHANDARI: Yes, but I then spoke to Mr.
20 Oppenheim yesterday and that's not my understanding that they
21 really don't have any and also based on the documents we
22 received -- a privilege log we received from Chegg it does not
23 appear that they don't have any.

24 THE COURT: Well, Chegg I can't do anything about.

25 MR. BHANDARI: No, no, but we received a privilege

1 log from Chegg that shows communications with the publishers.
2 So the publishers claiming that they don't have anything when
3 Chegg says that they have things from the publishers suggests
4 that that's not correct.

5 THE COURT: The publisher may have its own views. I
6 don't know.

7 So, Mr. Oppenheim, I skipped over this because I
8 read your letter that said you didn't have any such documents.
9 Is it correct or not?

10 MR. OPPENHEIM: So we -- Your Honor, we need to
11 identify what we're talking about. All kinds of issues are
12 running together and confusing the matter. So what is raised
13 on Page 3 of the letter, No. 2, is documents concerning the
14 effectiveness of the best practices. The court limited it to
15 effectiveness. We did a thorough review and there are no
16 documents to produce. We did provide a short log of a handful
17 of documents that we asserted common interest privilege on but
18 not with Chegg. It was -- it was regular privilege, attorney-
19 client privilege. So the Chegg issue is not part and parcel
20 of this.

21 With respect to effectiveness, there are no
22 documents. We complied with Your Honor's order.

23 THE COURT: Then -- all right. So --

24 MR. BHANDARI: Your Honor --

25 THE COURT: What's going on?

1 MR. BHANDARI: So if you read what Your Honor
2 ordered it was documents concerning a) the effectiveness of
3 the best practices identified on the website created by
4 plaintiffs, and b) whether others in the market are acting in
5 accordance with these best practices. Mr. Oppenheim told me
6 yesterday that they have things for B.

7 THE COURT: How about B, Mr. Oppenheim?

8 MR. OPPENHEIM: It's inclusive, Your Honor.

9 THE COURT: I don't know what to tell you, Mr.
10 Bhandari. He's saying he doesn't have documents. I can't
11 speak for what Chegg thinks is at issue. That's their view.

12 MR. BHANDARI: If you can look at the document that
13 we attached, Exhibit J, which is the privilege log produced by
14 Chegg on October 3rd --

15 THE COURT: Okay.

16 MR. BHANDARI: -- it has documents -- so there was a
17 settlement with Chegg about -- where Chegg was going to be
18 acting in accordance with the best practices. If you look at
19 the Bates stamp -- excuse me, the Document No. 8 -- excuse me.
20 12. If you look at Document No. 12 there is an email which is
21 dated September 27, 2016 from somebody named David Borders to
22 Dana Jewell and the description is email re: best practices
23 protocol and audits.

24 Now, our understanding from looking at this and from
25 talking to the Chegg lawyer is that there are in fact many

1 emails with the publisher related to Chegg's adoption of the
2 best practices, best practices protocols. So the publisher's
3 statement that there's no communications between them and any
4 of the textbook distributors related to best practices is
5 undermine one, by this privilege log; and two, by the fact
6 that Chegg's counsel has said that there are in fact
7 communications between the publishers and Chegg at least
8 related to best practice protocols but that they're not going
9 to produce it because the publishers and them supposedly have
10 a common interest privilege.

11 THE COURT: They're not withholding anything on
12 common interest.

13 MR. BHANDARI: Who's not?

14 THE COURT: The plaintiffs.

15 MR. BHANDARI: They shouldn't be --

16 THE COURT: Right.

17 MR. BHANDARI: -- but they are.

18 THE COURT: No, they're not. They would have a
19 privilege log.

20 MR. BHANDARI: They served a privilege log last week
21 of ten items that they claim they're withholding on common
22 interest grounds and they also asserted the --

23 THE COURT: But not within this category. They say
24 they don't have any.

25 MR. BHANDARI: Okay.

1 MR. OPPENHEIM: But, Your Honor --

2 MR. BHANDARI: Your Honor --

3 MR. OPPENHEIM: -- just so you understand --

4 THE COURT: Hold on.

5 MR. OPPENHEIM: -- Item 12 on this spreadsheet on
6 this privilege log. Dave Borders is the general counsel of
7 Chegg. Dana Jewell is the deputy general counsel of Chegg.
8 So this is -- what Mr. Bhandari is referring to is an internal
9 Chegg document I suppose. I have no idea what it is but it's
10 certainly not a publisher document.

11 THE COURT: That's a good point. I assumed you were
12 going to pick something out of the Chegg list that should be
13 in the possession of the plaintiffs.

14 MR. BHANDARI: Like I said, the Chegg counsel told
15 me that there were many communications between Chegg and the
16 publishers related to best practices protocols that were not
17 being produced.

18 MR. OPPENHEIM: I don't know from these
19 descriptions.

20 THE COURT: Would it have been so hard to say could
21 you tell me which items in the log you're talking about or
22 communications with the plaintiffs? Do you think it would
23 have been reflected in the author or recipient?

24 MR. BHANDARI: So, for example, we know that there's
25 emails between Chegg and the publishers. If you look at the

1 author on No. 6 it's Jessica Stitt who works for Cengage as
2 the author and the recipient are various people, one of whom
3 we've been told was -- that works at Chegg and its email re:
4 validation of publications.

5 THE COURT: So we have one. It's not 12 then. Do
6 you want me to look -- you want them to look at 6?

7 MR. BHANDARI: Six and then 7 is from Chegg to
8 Steven Rosenthal.

9 THE COURT: So, Mr. Oppenheim, do you know anything
10 about 6 and 7?

11 MR. OPPENHEIM: So, Your Honor, I don't know what
12 those documents are specifically but based on looking at this
13 I -- it seems pretty -- I'm guess and it's probably a pretty
14 good guess that this is an instance where Chegg sent a handful
15 of books to the publishers and said we're not sure if these
16 are counterfeit or not, could you take a look at them and let
17 us know. And the publishers responded. That has nothing to
18 do with the effectiveness or the best practices.

19 MR. BHANDARI: There's an email No. 34 which is
20 Linda Dicker at Chegg to Matt Oppenheim and several other
21 people -- excuse me, Linda Dicker. I don't know who -- where
22 she is but it's to Matt Oppenheim and several other people and
23 it says email re: training and audits. The training is
24 certainly something --

25 THE COURT: So we're skipping. We're giving up on 6

1 and 7, Mr. Oppenheim. Do you know anything about 34?

2 MR. OPPENHEIM: We sent people down to train folks
3 on how to identify counterfeits. That doesn't -- again, what
4 are we doing here? This doesn't have to do with
5 effectiveness. This is not --

6 MR. BHANDARI: Hold on a moment, please. These are
7 related to --

8 MR. OPPENHEIM: And based on the date of it, it's
9 probably before the best practices is my guess. I don't know.
10 But this is -- again, these aren't our documents. This is a
11 Chegg issue. If they've got a dispute with Chegg they need to
12 deal with it with Chegg.

13 THE COURT: No, no. The question is whether you --
14 well, that's no answer. In fact, that's a disturbing answer
15 because if this was a document in your possession that came
16 within A and B that I ruled on at the July 28th conference I
17 assume you're not denying it should have been produced. I
18 think that's the only question.

19 MR. OPPENHEIM: Well, assuming it's responsive, Your
20 Honor, right.

21 THE COURT: That's my question. I don't know if
22 it's responsive.

23 MR. OPPENHEIM: I don't know, Your Honor. We didn't
24 go through the Chegg log that we received and say did we
25 produce this or not produce this. We didn't -- I mean we

1 produced what was responsive. The defendants are now ignoring
2 the court's limitation that this request goes to the
3 effectiveness of the best practices. Look, there are a lot of
4 entities --

5 THE COURT: Hold on. It's not just -- it's not just
6 a --

7 MR. OPPENHEIM: -- that have now adopted the best
8 practices. There are many entities that have reached out and
9 asked questions about the best practices. Obviously the court
10 didn't order nor would it have been appropriate to order the
11 plaintiffs to open up and produce every email about every
12 discussion about other distributors deciding whether to adopt
13 best practices.

14 THE COURT: I -- listen, you keep harping on A and
15 there's also a B. I'm not saying it comes within B. It's
16 just strange that you keep ignoring B or maybe you were saying
17 it while I was talking. But I think it would be worth just
18 your looking at this email and seeing whether it was about
19 people -- whether they were acting in accordance with the best
20 practices. I understand the limitation because this was not a
21 ruling that says you get to hear about anybody's discussions
22 about counterfeiting. It was specifically about best
23 practices.

24 So I don't know if this email relates to best
25 practices or not. Apparently Chegg thought it was responsive

1 to something you said to them but that doesn't necessarily
2 mean, Mr. Bhandari, that it comes within this ruling that I
3 made on July 28th.

4 MR. BHANDARI: So I think there's a simple way to
5 maybe short circuit this, Your Honor. We can ask again Mr.
6 Oppenheim whether or not there are any emails or documents
7 related to whether others may market or acting in accordance
8 with the best practices. Our understanding is that there are.

9 THE COURT: He said -- no. That he was clear on.
10 He said -- Mr. Oppenheim, you think you produced what's in --
11 let me put it this way. You think you've made a reasonable
12 effort to identify the documents in A and B and have produced
13 them. Is that correct or not?

14 MR. OPPENHEIM: Yes. Yes, Your Honor, and in fact
15 the date of this entry that he's planning to predates Chegg
16 and Ingram's adoption of the best practices. So I think by
17 definition they couldn't be responsive.

18 THE COURT: Well, that's a good point.

19 MR. BHANDARI: So my question is this. Whether the
20 publishers have any documents with anybody at Chegg about
21 their adoption of the best practices after the best practices
22 were adopted. Our understanding those documents do exist. So
23 another simple question to ask is will the publishers agree
24 that they do not have a common interest agreement -- privilege
25 with any of the textbook distributors so that we can obtain

1 documents from those textbook distributors that are between
2 the publishers and the textbook distributors related to the
3 adoption of best practices.

4 THE COURT: You just went on a totally different
5 topic here. We asked Mr. Oppenheim this a thousand times.
6 He's already answered it. I don't expect him to say that it's
7 impossible there's a document there. I expect him to say that
8 he made the reasonable efforts to search for them. That's
9 been said. So your request to me on No. 2 which was that I
10 have to somehow order them to produce these documents to me is
11 moot and I don't have to reach the common interest doctrine.
12 I don't know what your last question was but it's not a
13 question to me.

14 So let's go to the next issue.

15 MR. BHANDARI: Discovery concerning damages.

16 THE COURT: Well, I've read everyone's letter on
17 this. I'm not quite sure what you're getting at. There's a
18 Rule 26 obligation to talk about computation of damages which
19 to me means actual damages and they're not -- they're not
20 relying on actual damages. They're going to make arguments
21 about why statutory damages apply or don't apply and I don't
22 think that's a factual discovery issue.

23 MR. BHANDARI: Your Honor, I think that it is in the
24 same way that a plaintiff in a case can say that they're going
25 to be making arguments about emotional distress that is a wide

1 range. They can claim anything that they want but prior to
2 trial they have to say what the range of emotional distress
3 damages are that they're seeking and what the basis for it is.

4 THE COURT: In terms of the number?

5 MR. BHANDARI: What's that?

6 THE COURT: In terms of a dollar number?

7 MR. BHANDARI: In terms of a number, yes. They have
8 to say --

9 THE COURT: That's easy. I assume they'll just give
10 you the statutory maximum.

11 MR. OPPENHEIM: That's what they're seeking \$150,000
12 and that's fine. They can say that --

13 THE COURT: That's all you want?

14 MR. BHANDARI: -- if that's that's their position.
15 Yes, but I'm not taking any position on that. If they're
16 going to tell a jury that the conduct that we've taken --

17 THE COURT: Why do you need them to say that? What
18 does it matter to you whether they choose 140 or 150? I'm
19 totally lost.

20 MR. BHANDARI: Because again the jury is going to
21 hear what it is that they are seeking. We want to hear it in
22 advance of what they tell the jury. If they're going to make
23 an argument as many plaintiffs do --

24 THE COURT: Are you sure --

25 MR. BHANDARI: Actually many plaintiffs do.

1 THE COURT: Are you sure that they're going to be
2 seeking a specific number? First of all, I thought it was a
3 judge decision. It's a jury decision?

4 MR. BHANDARI: It's a jury decision, Your Honor.

5 THE COURT: Okay. And the jury -- in tort cases we
6 don't allow them -- lawyers to say the number. Do you think
7 that's different in this case?

8 MR. BHANDARI: I think that it's a mixed question in
9 terms of -- in tort cases. Sometimes juries do hear a number,
10 sometimes they don't. But I -- if they're saying that they're
11 not going to say any number to a jury that's fine. That's a
12 totally reasonable position to take.

13 THE COURT: And you want to know whether they will
14 say the statutory maximum or some other number?

15 MR. BHANDARI: Exactly.

16 THE COURT: Mr. Oppenheim.

17 MR. OPPENHEIM: I don't know what discussion we're
18 having now. I do know that the issue raised in his letter is
19 a question of whether or not we've produced discovery
20 regarding damages and we elect -- we gave them our election
21 early. We had a discussion with them in May and in July.
22 They on the last day of discovery had raised an issue. The
23 one specific document that they asked for which they believe
24 is relevant has to do with the effect that counterfeits have
25 on the publishers. We've produced those documents. I

1 don't -- we don't have to tell them what we're going to argue
2 to the jury before we hear the case. That's certainly not
3 what they raised in their letter.

4 THE COURT: I don't see the basis either and it's
5 not in the letter. The application is denied.

6 What's the next issue?

7 MR. BHANDARI: Your Honor, one thing. On actual
8 damages just so we're clear, they're not going to present any
9 evidence of actual damages; correct?

10 THE COURT: Mr. Oppenheim, I thought that was in
11 your letter. Am I wrong?

12 MR. OPPENHEIM: I don't know what -- why I'm being
13 asked about what it is we're going to argue to the jury.
14 That's -- this is not a proper forum.

15 THE COURT: No, no, no. But here's the thing. I
16 think there was a specific -- they've asked you about actual
17 damages and you've not produced any documents on it. So are
18 there documents on actual damages or not that you're going to
19 offer?

20 MR. OPPENHEIM: No, there are no documents. We've
21 told them that other than the one set of documents that they
22 raised an issue with and we produced.

23 THE COURT: I think that's a sufficient answer, Mr.
24 Bhandari.

25 MR. BHANDARI: Your Honor, my question is a little

1 bit different. Under Rule 26 they're supposed to do an actual
2 damages calculation. Is the actual damages calculation zero
3 or is that some other number? Our understanding is it's zero
4 and if we have that clearly stated on the record that would be
5 -- that would obviate the issue with regard to actual damages.

6 MR. OPPENHEIM: Simply not true.

7 THE COURT: I think it's there's a simple answer.
8 There's a simple answer to this.

9 MR. OPPENHEIM: And we don't have to -- the whole
10 purpose and reason for having a statutory damage provision in
11 the law is because it's hard to calculate actual damages. Mr.
12 Bhandari's effort to get us to say or the court to say that
13 there are no actual damages so he can represent that to the
14 jury is improper. The fact that you can't necessarily
15 calculate them or can't calculate them easily doesn't mean
16 there are no actual damages. This letter is about documents.
17 There are no documents.

18 THE COURT: I agree, Mr. Bhandari. You can --
19 you'll be free to say to the judge or to the jury that there
20 was a Rule 26(a) disclosure obligation and they didn't
21 identify any computational damages. You can do whatever you
22 want with their absence of proof on this issue but I don't --
23 I don't think I can force them to say anything at this point.

24 Next issue.

25 MR. BHANDARI: So the next issue is there were three

1 titles at issue that the plaintiffs sued the defendants over
2 in this case. Then in their second amended complaint they
3 removed those three titles at issue. So originally there was
4 24 titles at issue in this case and now there's 21 titles at
5 issue in this case. That is testimony. The only testimony
6 we've seen is from the defendants regarding this is that they
7 are confident the books reviewed were counterfeits and they
8 believe that the books were supplied by the defendants and yet
9 the books were removed from this case.

10 We're entitled to explore why books were improperly
11 -- why there were improper allegations of counterfeit books in
12 this case. That's certainly something that goes to the
13 credibility of witnesses, goes to who their decision makers
14 are and what titles they're suing us over.

15 THE COURT: Decision makers in this litigation you
16 mean.

17 MR. BHANDARI: The decision makers -- the fact --
18 the people at the publishers made a decision to include
19 certain books and people at the publishers made a decision to
20 withdraw certain books. Those are decisions that were made by
21 the plaintiff, plaintiffs in this litigation. McGraw-Hill.

22 THE COURT: Well, it could have been made by the
23 attorneys. It could have been made by anyone. An attorney
24 could say you know what, I can't prove this one by a
25 preponderance of the evidence, this one we can, this one we

1 can't. I've now changed my mind. It's very unusual you get
2 to explore those decisions but go ahead.

3 MR. BHANDARI: Your Honor, we think that it is a
4 factual issue that does not implicate attorney-client
5 communications. We want to know why the publishers thought
6 that particular books should be included in this lawsuit, why
7 they thought they were counterfeit.

8 THE COURT: But you already had an opportunity to
9 depose them on the ones that they included or didn't -- I
10 assume didn't include. I guess the --

11 MR. BHANDARI: We asked questions why the decision
12 was made.

13 THE COURT: But you could say what is it about this
14 book that makes it counterfeit. When did you -- you took the
15 depositions before or after the withdrawal? Not that it
16 matters.

17 MR. BHANDARI: After the withdrawal.

18 THE COURT: Did someone stop you from asking at the
19 time I'd like to talk about this book that was withdrawn, tell
20 me -- is this book what counterfeit. Why do you think it's
21 counterfeit, why do you think it's not counterfeit? I don't
22 think I would have stopped you from asking those questions.

23 MR. BHANDARI: I did not -- I was not stopped from
24 asking those questions. I was stopped from asking the
25 question why did you sue on this book originally and why --

1 THE COURT: That's not relevant to a claim in this
2 case. What's relevant is whether the books are counterfeit
3 and what indicia there are that they are or are not
4 counterfeit.

5 MR. BHANDARI: So the statement by the witness, the
6 30(b)(6) witness was that the books were counterfeit. She did
7 not change her opinion on whether or not those books were
8 counterfeit and that the books were in fact distributed by the
9 defendants.

10 THE COURT: Right.

11 MR. BHANDARI: She did not change her opinion on
12 whether or not the books were distributed by the defendants.

13 THE COURT: So you're entitled to explore anything
14 related to that but not what goes on in her head as to why it
15 should be part of a lawsuit. That's not related to a claim or
16 defense in this case.

17 MR. BHANDARI: So why would the book be withdrawn if
18 you think a book is counterfeit and a source from the
19 defendants, what possible reason would you have for not suing
20 the defendants over those books in this litigation and
21 withdrawing the books.

22 THE COURT: That's not the question. The question
23 is what possible reason it's relevant to a claim or defense in
24 this case.

25 MR. BHANDARI: The claim or defense is is there some

1 other factor besides being certain that a book is counterfeit
2 and supposedly certain that the book was provided by the
3 defendants that causes the plaintiffs to sue in a situation
4 like this.

5 THE COURT: Not relevant to a claim or defense in
6 this case. So that's my ruling on that.

7 MR. BHANDARI: And it goes to the cred --

8 THE COURT: No, we're done. Next issue.

9 MR. BHANDARI: So the documents concerning printing
10 errors. There was testimony saying that they consulted error
11 files and those error files have not been produced.

12 THE COURT: Another one they say they --

13 MR. OPPENHEIM: Your Honor, can I --

14 THE COURT: Go ahead.

15 MR. OPPENHEIM: -- address this quickly?

16 THE COURT: Yes.

17 MR. OPPENHEIM: So we did an exhaustive search
18 because this issue has been re-raised repeatedly. With
19 respect to the titles at issue there are no documents that are
20 responsive. What Mr. Bhandari is seeking is for the
21 plaintiffs to produce every document about printing errors
22 having nothing to do with the titles at issue in this case and
23 the court has never ordered that and in fact the court has
24 limited it to the titles at issue in the case and the issue
25 has not been properly -- it's just -- this is not an issue.

1 THE COURT: Well, I heard a couple of answers there.
2 I thought -- I mean is there -- are there documents regarding
3 printer errors for any of the titles and issues in this case
4 that you haven't produced, Mr. Oppenheim?

5 MR. OPPENHEIM: The answer is no. We've looked
6 thoroughly and there are no such documents.

7 THE COURT: And the thing that Ms. Periano was
8 referring to is not such a document, or do you know what she
9 was referring to?

10 MR. OPPENHEIM: Ms. Periano -- I'm sorry, Your
11 Honor. I thought you were done. I apologize.

12 THE COURT: What was she referring -- do you know
13 what she was referring to and is it responsive to this
14 request?

15 MR. OPPENHEIM: Sure. She has a file. I think -- I
16 don't know that it's she but the company has a file with
17 printing errors on a title by title basis. They went and
18 searched with respect to the titles at issue in this case were
19 there any documents associated with -- indicating printing
20 errors for the titles at issue in this case and the answer was
21 no, there were none.

22 THE COURT: It sounds like that's it, Mr. Bhandari.

23 MR. BHANDARI: Ms. Periano testified differently.
24 She testified that she actually consulted the printing error's
25 document for certain books because she was reviewing different

1 editions of those books -- excuse me, different print runs of
2 those books so she was looking at the print error files when
3 she rendered her expert opinion. She specifically mentioned
4 the document that she consulted.

5 THE COURT: No, but the document may exist but he's
6 saying these titles aren't on it.

7 MR. BHANDARI: She testified differently.

8 THE COURT: She said the titles are on it?

9 MR. BHANDARI: She said she consulted with something
10 about one of the titles at issue in this book to see the error
11 file and none of the -- there was no errors of the type that
12 would make her --

13 THE COURT: But there were other errors?

14 MR. BHANDARI: I don't remember whether --

15 THE COURT: But it's not -- maybe she looked at the
16 list and those titles weren't on there.

17 MR. BHANDARI: I understand mr. Oppenheim's
18 position. It seems contradictory from what we heard from the
19 expert but to the extent that he's representing that that's
20 true if we find something indicating otherwise we'll call it
21 to the court's attention.

22 THE COURT: Next issue.

23 MR. BHANDARI: So this is the list of books that the
24 plaintiffs supposedly show their employees so that the
25 employees can determine whether or not a book is likely to be

1 counterfeited. We got testimony that there was lists of books
2 that need to be flagged for secondary review and we asked for
3 such documents in our document requests that during
4 depositions of the 30(b)(6) witnesses we determined that in
5 fact there are such documents that exist that had not been
6 produced and that's what we're seeking here which is basically
7 the list of books --

8 THE COURT: Again, let's talk about what document
9 request this means and whether I made a ruling at the May 4th
10 hearing limiting it because that's what the defendants'
11 argument is on this.

12 MR. BHANDARI: Sure. The document request is No. 12
13 which is Exhibit I.

14 THE COURT: Right. Did I not rule on this at the
15 May 4th hearing and limit it to the policies and procedures?

16 MR. BHANDARI: Your Honor, yes. Sorry. These are
17 encompassed in policies and procedures. The procedure is that
18 there's a list of books that are flagged for secondary review
19 that are shown to their employees and it's just simply a
20 document. There's no real basis for them not producing it
21 other than they say it's highly confidential. It's not
22 burdensome. It's not difficult. It's a list of books that
23 are provided to the personnel who inspect incoming inventory
24 that highlight for them books that are known to have been
25 counterfeited in the past.

1 So it is a policy and procedure. It's a simple list
2 of secondary -- for secondary review.

3 THE COURT: I mean it's not a policy and procedure.
4 What it is is a method of implementing a policy and procedure
5 which is -- you should check inventory or whatever against
6 this list.

7 MR. BHANDARI: I suppose it's a semantic difference,
8 Your Honor. I mean from us the policy would be you should
9 check incoming books against this list and you would say that
10 is an implementation directive. I mean we would view it as a
11 policy.

12 THE COURT: Why do you need the list though?

13 MR. BHANDARI: To show that we have the exact same
14 policies or more expansive policies where we're flagging the
15 same books and more books in order to try and eliminate
16 counterfeits from ever getting into our inventory. We need to
17 show a jury we're behaving like the best --

18 THE COURT: Right. But why can't you do it by
19 saying we also have a list?

20 MR. BHANDARI: Because to compare the two lists and
21 say look at what they look at, look at what we look at, we're
22 not behaving willfully.

23 THE COURT: Are you going to show the jury your
24 list?

25 MR. BHANDARI: Yes.

1 THE COURT: Well, they're going to be precluded from
2 showing the jury their list. So it sounds like you're doing
3 much better than looking at their list. Why do you need their
4 list?

5 MR. BHANDARI: Your Honor, for the reasons --

6 THE COURT: Isn't it better not to have it? To
7 preclude them from showing it to anyone. Let's say their list
8 is longer, that's going to be bad for you.

9 MR. BHANDARI: Our understanding is that their list
10 is not longer.

11 THE COURT: You'll be able to say you know what,
12 jury, we haven't even seen their list. Look at our list.
13 Look how great it is.

14 MR. BHANDARI: Your Honor, I suppose there are a lot
15 of different ways to present things to a jury. We'd like to
16 have the document.

17 THE COURT: I just don't know why you need it
18 because it obviously has some confidentiality to them.

19 Anyway, so, Mr. Oppenheim, what's your view on this?

20 MR. OPPENHEIM: My view is that in May we had a
21 hearing on this. Your Honor limited this to policies and
22 procedures. This is a living breathing catalog that changes
23 what the plaintiffs are looking at. It is among the most
24 highly secretive documents that we used for our piracy efforts
25 and it's not responsive to what Your Honor ordered and it

1 shouldn't be produced especially against a serial defendant in
2 counterfeiting cases. Even subject to EO I would have great
3 concerns and worries about producing this.

4 THE COURT: Mr. Bhandari --

5 MR. OPPENHEIM: But most importantly it's just not
6 responsive.

7 THE COURT: Mr. Bhandari, I think when I was talking
8 about policies and procedures I was talking about them from a
9 descriptive standpoint which is our policy is to do A, B and
10 C, our policy is to do D, E and F, and I don't see why you
11 need the actual list. It's enough to know that there's a
12 policy to compare it against the list. So I'm denying that
13 request.

14 Source spreadsheet. I think the answer from the
15 defendants was that they don't have such a thing.

16 MR. BHANDARI: No. They said that they already
17 produced it. So if they could provide us with a Bates stamp
18 number of what they supposedly already produced --

19 THE COURT: Plaintiffs are unaware of the existence
20 of any MBS source spreadsheet.

21 MR. BHANDARI: But at the beginning of our phone
22 call Mr. Oppenheim -- when we were talking about the MBS
23 deposition --

24 THE COURT: Oh, I'm sorry.

25 MR. BHANDARI: -- one of the things Mr. Oppenheim

1 said at the beginning of this phone call was there is some --
2 I've read you the excerpt from Jessica Stitts' deposition
3 transcript saying she consulted with the source spreadsheet.
4 Plaintiffs up until this point claimed they had no idea what
5 Jessica Stitt was talking about.

6 Then on this phone call Mr. Oppenheim said oh,
7 that's a source spreadsheet that compiled all of the slips in
8 -- there's a spreadsheet she looked at and it was produced to
9 the defendants in this case. If that's the case I ask for Mr.
10 Oppenheim to simply provide the Bates stamp number of the
11 document that up until this morning they claimed they had no
12 idea whether or not such a thing existed.

13 THE COURT: Mr. Oppenheim.

14 MR. OPPENHEIM: The reason these discussions are
15 difficult is because within their letter they don't cite to or
16 excerpt the testimony that they are referring to and so we
17 we're sitting here trying to figure out what did the -- what
18 did the Cengage witness say. It's not I think what Mr.
19 Bhandari just described. I've described it, there were slip
20 sheets. We've produced the relevant slip sheets. The
21 aggregation of those slip sheets were put into a spreadsheet
22 of sorts. It's not called -- I don't know what it's called
23 but I don't think it's called MBS source spreadsheet. But
24 they have that. It's been identified to them. They've seen
25 it. If they want us to identify it to them again I'm happy to

1 do that but there's no -- there's nothing here.

2 THE COURT: Do you have Bates numbers you can give
3 them? Not now but by Monday.

4 MR. OPPENHEIM: Yes.

5 THE COURT: Okay. So do that by Monday.

6 MR. OPPENHEIM: Yes, of course. I can give it to
7 them later this afternoon, Your Honor.

8 THE COURT: Good. So I put off the issue -- I know
9 we have a little Chegg issue but I will now give you the
10 ruling on the deposition issue.

11 So I am reluctantly going to allow only a deposition
12 -- when I say reluctantly I don't know that I should be
13 allowing any depositions but I'm prepared to allow a
14 deposition of MBS on the date they chose on the understanding
15 that the issue will be limited in the extreme to the four --
16 their sources of their four textbooks at issue and their
17 knowledge of that.

18 In addition, there's going to have to be a videotape
19 set up so that not only does Mr. Oppenheim not have to travel
20 but Mr. Bhandari is no at greater advantage by being at the
21 location. So the witness can either come to Washington or you
22 can set up a three-way video but this has to be very limited.

23 Now, if they want to start complaining about this on
24 some other cases, MBS, I'm not going to preclude them from
25 doing that since they're not here but since I have control

1 over deposition notices that get issued from this court I will
2 make those limitations as being sort of the maximum of what's
3 going to be permitted.

4 Any questions about the ruling, Mr. Bhandari?

5 MR. BHANDARI: Your Honor, we would request that we
6 also be able to ask about MBS's policies and procedures for --
7 in keeping books in their inventory to see whether or not
8 there's commingling and other -- basically the chain of
9 custody so we can establish --

10 THE COURT: If you can do a number that relates in
11 some way to figuring out how they know those textbooks came
12 from you that's reasonable but that has to be the central
13 focus.

14 MR. BHANDARI: Okay.

15 THE COURT: Any questions, Mr. Oppenheim?

16 MR. OPPENHEIM: Your Honor, the scope that was
17 previously noticed is very, very broad. Your articulation of
18 limiting it to the source of the four books works and concerns
19 that that under the guise of well, it's semantics will be
20 overblown and kind of knowing what happened in the Chegg
21 deposition that we went through there are going to be all
22 kinds of questions about well, how is it that you received
23 books and what do you do to inspect them and how many
24 counterfeits do you have and have you ever distributed a
25 counterfeited. It becomes an inquisition of the third party

1 about their entire business, all of their interactions with
2 the publishers on every possible issue. If it's really
3 limited to the four books fine but I'm concerned about how
4 we're going to enforce that limitation.

5 THE COURT: I'm hopeful. I mean some of the things
6 you said seem clearly outside like other instances -- I can't
7 remember what you just said but other instances of sales
8 unrelated to these four topics and other accusations of
9 counterfeit but questions about the chain of custody I would
10 call it about that -- that relate to these four books I think
11 are fair and shouldn't be burdensome to MBS. So my hope is it
12 will work.

13 MR. OPPENHEIM: Very well, Your Honor.

14 THE COURT: Chegg. We have a little problem which
15 is that I don't know that -- no one pointed out to me that --
16 I don't know if Chegg was even sent this letter of October 4th
17 but if they were no one pointed out to me that they haven't
18 responded and I noticed they're not here. So I'm not quite
19 sure what we do about that. Were they sent this letter?

20 MR. BHANDARI: No, Your Honor, we did not send this
21 letter to them.

22 THE COURT: Well, then I don't know how I can
23 possibly rule on something involving Chegg if they're not
24 present.

25 MR. BHANDARI: I think there's a simple way to rule

1 on this issue which is a common interest privilege means that
2 there has to be two sides to the privilege. If one side says
3 that there's no privilege then we can go back to Chegg and we
4 can say there is no common interest privilege because the
5 publishers say that there is no common interest privilege, so
6 please produce --

7 THE COURT: Well, I don't know that they're saying
8 that.

9 MR. BHANDARI: That's how we can resolve it here.
10 Just as you were able to make a ruling on the MBS --

11 THE COURT: No, no, no, no, no. I'm not going to --
12 no, that's ridiculous because Chegg has its own right to claim
13 a common interest privilege even if we could somehow force
14 Cengage to say otherwise or -- no. This is a process issue.
15 Cengage is here. That's fine. They can speak to their
16 position on this but even -- I can't decide something for
17 Chegg if they're not present. That's absurd.

18 So if you want to do a new letter that is sent to
19 Chegg and which I would require them -- you should explain my
20 individual practices and they need to respond that's fine but
21 I'm absolutely not going to rule on something that affects
22 Chegg without them being notified.

23 MR. BHANDARI: Okay. Fair enough. We'll do that.

24 THE COURT: All right. There's more. Hold on.

25 [Pause in proceedings.]

1 MR. OPPENHEIM: Your Honor, just one clarification
2 on the prior ruling on the depositions.

3 THE COURT: Yup.

4 MR. OPPENHEIM: I presume that by omission you're
5 deciding not to permit the deposition of Amazon to go forward.
6 Is that correct?

7 THE COURT: That is absolutely correct. No Amazon
8 deposition.

9 MR. OPPENHEIM: Thank you, Your Honor. I'm sorry.
10 I just wanted to clarify. Thank you.

11 THE COURT: The remaining issue is one I think that
12 was just raised and you haven't had a chance to respond yet on
13 which is the number of hours for the Cox deposition and the
14 due date of the letter on the proposed expert report. So your
15 choice, Mr. Pandora. Do you want to do this orally or do you
16 want a chance to respond in writing? The response would be
17 due Monday.

18 MR. BHANDARI: Sure. Ms. Vickers I think is
19 prepared to respond orally just so we can expedite this and
20 get the court's ruling.

21 THE COURT: All right. Let's try that and if Mr.
22 Oppenheim has a problem with getting it orally without a
23 chance to digest it I'll hear from him. Go ahead.

24 MS. VICKERS: Okay. So, Your Honor, there were two
25 issues that were raised. One was with respect to the timing

1 of the report that the plaintiffs plan to submit and the other
2 was with respect to the length of Ms. Cox's continued
3 deposition.

4 With respect to the timing of the report, what
5 plaintiffs had proposed -- first of all, it's not necessary
6 and I can speak to that but it's also not workable given our
7 current schedule because as Your Honor noted previously you've
8 not yet ruled on whether this report would be permitted to
9 begin with. So after the plaintiffs submit their proposed
10 report we would need an opportunity to respond to that to why
11 it's not appropriate. Your Honor would need to rule on that.
12 Then to the extent that you did allow it we would need the
13 opportunity to identify a rebuttal witness and provide a
14 rebuttal report.

15 What we would propose as a more reasonable
16 resolution is to keep the dates that Your Honor had said --
17 you had actually extended the date after we offered to produce
18 additional information and to the extent that -- we don't
19 believe that the deposition of Ms. Cox is necessary for the
20 preparation of this report given the materials that were
21 produced, and I'll speak to that in a minute. But to the
22 extent that the plaintiffs are able to make a showing that
23 they need to supplement in some way their report as a result
24 of Ms. Cox's deposition then they're entitled to try to make
25 that showing. But we don't think the schedule really allows

1 for them to wait this long to prepare that report.

2 THE COURT: What about the hours?

3 MS. VICKERS: So with respect to the hours, so the
4 materials that were produced -- that were produced just
5 recently the plaintiffs have described them as being
6 voluminous and complex, documents that should have been
7 produced before and that's not -- that's not correct. We
8 agreed to make the production of these materials essentially
9 for two reasons.

10 One was because they wouldn't agree to a stipulation
11 that the distribution information we already produced that all
12 the distributions went to Mr. Smyers. So we said okay, fine,
13 we'll give you some additional information to document it.
14 The materials are -- and the second reason we produced these
15 materials quite frankly was to stop -- we've been going back
16 and forth on these financials. It's taken up a lot of our
17 time. It's taken up a lot of Your Honor's time. We didn't
18 want to have this dispute any more about whether we were or
19 were not somehow hiding information but the information that
20 we produced is not complex. It's things like the K-1s to Mr.
21 Smyers which have a box that says distribution. It is largely
22 duplicative information about payments to Garrison. Any
23 information we produce this time is the same information we
24 produced before because as we've indicated multiple times to
25 the plaintiffs the Garrison reports we produced before had

1 historical information.

2 To the extent it's about different entities like the
3 UK entity it's really not relevant to this case. We just
4 wanted to stop having this fight but these materials are
5 tangential, duplicative and simple and I don't think that it
6 warrants additional time with Ms. Cox.

7 THE COURT: Mr. Oppenheim.

8 MR. OPPENHEIM: Your Honor, unlike the issues -- I'm
9 sorry.

10 THE COURT: Go ahead.

11 MR. OPPENHEIM: Unlike the issues that we've been
12 going through with respect to the defendants' production, the
13 plaintiffs moved on -- to compel the production of financial
14 documents on March 3rd -- excuse me, 30th of this year. We
15 have been back to the court at least five times to get these
16 documents. So the court -- when we became aware that -- well,
17 initially all we had were the annual financials highly
18 redacted. We got the court to unredact those.

19 Then we looked at those. We took a deposition of
20 Ms. Cox and learned that there were many things not included
21 and she had readily handled these monthly financial packages.
22 We came back to the court. The court said yes, you should get
23 these monthly financial packages and you get two hours again
24 with Ms. Cox.

25 We take Mr. Smyers deposition and we learn contrary

1 to what the defendants had told us and just told the court
2 that all of the distributions went to Mr. Smyers that there
3 were distributions to others. In fact, there were.

4 We come back to the court yet again. We ask for
5 additional financial information. What was produced on
6 Wednesday night, Your Honor, is 498 different financial
7 spreadsheets. This is the information that should have been
8 produced in March and we have been ridiculously prejudiced by
9 this. There are numerous questions about these documents as
10 we look at them. First of all, they're entirely inconsistent
11 with the annual financial reports to the tune of tens of
12 millions of dollars to Mr. Smyers which are not in the
13 financial reports.

14 There are -- but looking at these documents some of
15 the information like the millions of dollars to Mr. Smyers is
16 evident but some of the information you can't understand
17 without asking a CFO question. So, for instance, when there's
18 descriptions of phase one and phase two for certain financial
19 reporting you just can't know what that is until you ask the
20 CFO what is phase one, what is phase two.

21 So we absolutely need to ask Ms. Cox about all of
22 these documents. And we will not be able to cover all the
23 monthly financial packages and these 498 spreadsheets within
24 the course of two hours. It's just not possible. So that's
25 number one.

1 Two, we -- our expert is going to need to rely on
2 this additional information in order to generate the proposed
3 report which is going to -- all the more necessary because now
4 we have such massive financial information which we didn't
5 have before.

6 The issue here is not whether the defendants will be
7 prejudiced. The question is will the defendants be unfairly
8 prejudiced and on that the answer is clearly no. This is an
9 issue of their making. Had they produced the financial
10 documents when Your Honor first ordered them to produce them
11 after our March 30th letter they would not be in the position
12 they're in now in terms of trying to respond to our expert
13 report.

14 So the idea that we should get jammed up because
15 they didn't comply with the court's orders over and over and
16 over and over again doesn't make sense to me. I frankly still
17 think that their conduct was sanctionable. Your Honor chose
18 not to sanction them but clearly jamming us up in order to
19 make sure that their rights are protected on the back end
20 doesn't make sense to me.

21 MS. VICKERS: May I respond?

22 THE COURT: Yes.

23 MS. VICKERS: So that's --

24 THE COURT: By the way, when is the deposition
25 scheduled for?

1 MS. VICKERS: We proposed -- we made Ms. Cox
2 available for the 19th and the plaintiff said they would not
3 agree to that unless we agreed to an extension of the report.

4 THE COURT: When did they want to have it?

5 MS. VICKERS: They --

6 MR. OPPENHEIM: Your Honor, we --

7 THE COURT: Go ahead.

8 MR. OPPENHEIM: We can do the 19th, Your Honor, but
9 we need to have a week to digest that -- for our expert to
10 digest the answers and put together the report the 26th. So
11 what I said to the defendants was we need to have a package of
12 dates here to propose -- to how to handle this.

13 THE COURT: Okay. But what if we got her earlier?

14 MR. OPPENHEIM: Well, we have 498 spreadsheets to
15 get through before we even take her deposition. So I don't
16 know how we could even do that, Your Honor. As is the 19th is
17 going to be a challenge. That's Thursday I believe.

18 THE COURT: Well, let me ask you this. Would you
19 rather have more time before her deposition or more time to
20 prepare the report after her deposition? Which period is more
21 important?

22 MR. OPPENHEIM: Your Honor, I'm asking -- Your
23 Honor, a week on either side is frankly less than we need but
24 we can manage it. I don't think we should have to take less
25 than that. 498 spreadsheets produced Wednesday night.

1 MS. VICKERS: May I respond to that because --

2 THE COURT: Well, I know there's a factual dispute I
3 have no way of resolving between you and Mr. Oppenheim as to
4 the nature of these documents but go ahead and response.

5 MS. VICKERS: I think I can actually clarify some of
6 that. So the reports with the exception of maybe ten or 12
7 spreadsheets -- what Mr. Oppenheim is referring to are
8 actually just 12 -- around a dozen reports that have sub
9 spreadsheets. I guess he's tallied them up and he's found
10 that there's are hundreds. Those reports are the Garrison
11 reports. As I indicated before, we previously produced the
12 information that the plaintiffs -- the reason that the
13 plaintiffs have said those -- they wanted the monthly Garrison
14 packages is they said we want to know how much money was being
15 paid to Garrison because you've characterized that not as a
16 distribution. We think it's a distribution. We think it's
17 profits. We think it should be -- it should go in the profit
18 column.

19 We said okay. So we produced those Garrison
20 reports. We produced them. They contained historical
21 information going back to the beginning of the relationship
22 with Garrison. So they have now had for weeks the reports
23 that show all the information. It's literally -- it's one
24 spreadsheet. It's not 498. It's one of these spreadsheets
25 that say -- has list of years and how much money has been paid

1 to Garrison. That's why they said they needed this
2 information. We produced it. They've had it.

3 We produced in -- again, in the interest -- I
4 absolutely take -- I absolutely disagree with plaintiff's
5 characterization of our productions previously. We produced
6 everything this court ordered. This production was made just
7 to close out this issue. In an effort to do that we said
8 look, are there any other reports that we have that relate to
9 this Garrison relationship so we can't be accused of not
10 having produced something. We found a few other reports which
11 again have duplicative information about these monthly
12 payments to Garrison. Absolutely duplicative information
13 about the historical payments. So we produced those.

14 They may have many tabs, they may have discussion
15 about the phase one and two and how these payments were
16 calculated but that's not what the plaintiffs have ever raised
17 as the relevance of these documents. All they've said is we
18 want to know how much you paid to Garrison and they've had
19 that information.

20 So Mr. Oppenheim can say 498, 498, but the truth is
21 it's one page of a spreadsheet which is duplicative of what
22 we've already produced. So I do think that that is a
23 mischaracterization of our recent production.

24 MR. OPPENHEIM: Your Honor, just to --

25 THE COURT: Go ahead.

1 MR. OPPENHEIM: For clarification sake. Let me just
2 give you an example. In none of the prior documents that were
3 produced either in the annual financial statements or the
4 monthlies as far as we can tell was there ever any financial
5 information provided about the affiliated entity Gekr, G-E-K-
6 R, providing distributions in the millions of dollars every
7 year to Mr. Smyers.

8 THE COURT: Mr. Oppenheim, hold on. Mr. Oppenheim.

9 MR. OPPENHEIM: Yes.

10 THE COURT: I'm going to make the ruling on this.
11 I'm going to allow the four hours and I'm going to allow the
12 additional time for the expert report. I'll make every effort
13 to -- in other words, expert report on the 26th plus the
14 letter explaining why it should be permitted.

15 I'll make every effort to give the defendants a
16 chance to respond to it. This is a very narrow issue in a
17 sense because it goes only to I guess the -- an argument about
18 statutory damages, punitive damages and so forth. It doesn't
19 relate to liability anyway which is of course the heart of the
20 case. So I think there's going to be very little problem with
21 just having a separate track on this and allowing expert
22 reports if I do allow it on a timetable that comes after the
23 timetable that's being contemplated right now for the trial.

24 So four hours plus October 26th for the letter and
25 expert report.

1 Anything else we need to do today, Mr. Oppenheim?

2 MR. OPPENHEIM: I have a question for Your Honor in
3 terms of process if I may. I don't think it's a disputed
4 issue. In terms of a final pretrial conference with Judge
5 Pauley, is that something we should contact his chambers to
6 get on calendar? Do you have a suggestion on how we should
7 set that up because I don't believe that's on calendar yet.

8 THE COURT: I don't know about Judge Pauley. I don't
9 have final pretrial conferences. I just have -- I set a trial
10 date and let everyone show up and then do motion in limine
11 rulings in writing. If he normally has a final pretrial
12 conference you should feel free to write him a letter and say
13 we're ready to have one scheduled or we don't know if you have
14 one and do you want one. I don't think that's anything I can
15 be involved in to answer your question.

16 MR. OPPENHEIM: That actually is very helpful.
17 Maybe he doesn't intend to have one. Okay. Thank you, Your
18 Honor. I wasn't sure.

19 THE COURT: Okay.

20 MR. BHANDARI: Nothing else from plaintiffs, Your
21 Honor.

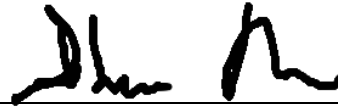
22 THE COURT: Okay. Thank you everyone.

23 MS. VICKERS: Thank you, Your Honor.

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1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

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6 Shari Riemer, CET-805

7 Dated: October 16, 2017
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